104

# MUSIC LICENSING AND SMALL BUSINESS

Y 4.SM 1:104-76

Music Licensing and Small Business,...

## HEARING

BEFORE THE

## COMMITTEE ON SMALL BUSINESS
## HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

WASHINGTON, DC, MAY 8, 1996

Printed for the use of the Committee on Small Business

**Serial No. 104–76**

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# MUSIC LICENSING AND SMALL BUSINESS

**WEDNESDAY, MAY 8, 1996**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
*Washington, DC.*

The Committee met, pursuant to notice at 10 a.m., in room 2359, Rayburn House Office Building, the Honorable Jan Meyers (Chair of the Committee) presiding.

Chair MEYERS. Good morning. The Committee will come to order. Today's hearing is our second in a series of hearings looking at intellectual property issues of importance to small business.

The issues surrounding music licensing practices of the Performing Rights Societies, ASCAP, BMI, and SESAC, has long been a major concern for small businesses in the entertainment and retailing industry.

The background music that we all hear when we're out at our favorite restaurant or local bar or a retail store is something that many people don't really think that much about. Today's hearing will change all that. Because how music is licensed and who pays for it, and how many times it is paid for, is going to surprise many of us.

As many of you know, music licensing under the copyright laws and the antitrust consent decrees in effect with respect to ASCAP and BMI are issues that are within the legislative jurisdiction of the Committee on the Judiciary.

However, the Committee on Small Business has a tradition of holding oversight hearings on issues of importance to small business. In fact, in 1957, during the 85th Congress, a Subcommittee of the Permanent Select Committee on Small Business of the U.S. House of Representatives held 5 days of investigative hearings on the practices of ASCAP.

The record of those hearings covered over 700 printed pages; and as a result of those hearings, members of the Committee held an executive session with Representatives of the Department of Justice who took the matters presented at the Subcommittee hearings under consideration in their continuing enforcement of the 1950 consent decree against ASCAP.

Today this issue of music licensing remains critical to many small businesses. For example, 92 percent of NFIB members have demanded music licensing reform legislation and are firmly behind H.R. 789, the Fairness in Music Licensing Act. This legislation was introduced by my colleague and friend, Jim Sensenbrenner, and I am proud to be a cosponsor.

I have asked Mr. Sensenbrenner to join us on the Committee today and to take part in our proceedings, although, he says that he may have to leave at least for a time. Despite my own strong sentiments in favor of H.R. 789, today's panel of witnesses were carefully selected in an effort to present a balanced view of the competing concerns in this area of music licensing.

At this point in time, I would like to yield to Mr. Sensenbrenner for just a moment since he does have to leave he may be back later, and then I will certainly yield to our ranking member, Mr. John LaFalce. Mr. Sensenbrenner.

[Chair Meyers' statement may be found in the appendix.]

Mr. SENSENBRENNER. Thank you very much, Madam Chair, for the opportunity to participate in today's hearing. I agreed to introduce H.R. 789, the Fairness in Music Licensing Act of 1995, after I received a number of phone calls from irate small business owners in my district complaining about something called "ASCAP" and their music licensing practices.

They were told to call their Congressman if they didn't like what was going on, and they did. Madam Chair, I applaud you for responding to these and other folks nationwide by holding this hearing today.

We on the Judiciary Committee are examining this issue from an intellectual property perspective. I commend you for examining the small business issues. Songwriters deserve a royalty for the use of their music. Congress must decide which circumstances require a payment and by whom.

Current law establishes a home-style exemption. Unfortunately, it has proven unworkable and we can do better. The question on this issue, like so many others, is: How do we do better?

H.R. 789 is more narrowly drafted than similar legislation introduced in the last Congress. It is not an attempt to simply get businesses out of paying for using music, as is sometimes portrayed by the opponents.

I introduced H.R. 789 to reestablish some of the loss tenets of the marketplace to music licensing practices. The absence of these principles has brought us to the present discord. Business owners shouldn't have to pay for the music beyond their control. They shouldn't be forced to do business with every music society that demands a fee. They should be told what they're paying for, and they should have an economical method of resolving disputes at their disposal. Unfortunately, current law doesn't protect these rights. H.R. 789 fixes this problem.

Many people don't tune into the nightly news or to a football game to listen to the music. They want to know what happened, what the weather is like, and what team will win. Many broadcasts contain an incidental snippet of music.

The music licensing societies are aiming at charged fees because of this music, regardless of the fact that songwriters have already been paid by the network, by the marching band, or by the advertiser; but because you never know which piece of music or song might be broadcast on radio or TV or cable, a business owner must pay every music licensing society their asking price. The only alternative is to turn the radios and TV's off altogether, even though they're entitled to the rest of the program without paying the fee.

H.R. 789 creates an exemption for music broadcast over radios and TV. It does not affect tapes or compact discs or live bands that are brought into retail establishments. The bill addresses other concerns. Businesses often don't have any real way to know what they purchased. Song titles in the music societies' repertoires are often unavailable or accessible only with considerable effort and sometimes costs.

Without this information, it's nearly impossible to know whether one society or another offers better value, and it's almost impossible to restrict music played on tapes and compact discs to the repertoire of just one music licensing society. H.R. 789 requires the societies to make their repertoires easily acceptable and accessible.

Finally, business owners have no way to dispute an unfair fee. Current law requires a small business owner to go to a single court in New York City and spend thousands of dollars in legal expenses to dispute an improper fee, often involving only a few hundred dollars. Clearly, the businessman or businesswoman who applies a cost-benefit analysis to this decision quickly concludes there is no alternative but to pay the fee that's demanded, because the cost of going to court is so prohibitive. H.R. 789 allows the owner to seek arbitration, rather than paying excessive litigation expenses.

While I'm disappointed a solution hasn't been found to both sides' satisfaction, I am encouraged that the more people learn about this issue, the more they want to help solve it.

Last Congress' bill had 33 cosponsors, my legislation has about 170. We're moving in the right direction. Again, Madam Chair; thank you for holding today's hearing, and I thank you for the opportunity to make an opening statement.

Chair MEYERS. Thank you. Mr. Sensenbrenner, and we hope that you'll be able to return to the Committee later. Mr. LaFalce.

Mr. LAFALCE. Thank you very much, Madam Chair. We are holding a hearing this morning, very appropriately, on an issue that is controversial and very complex. We all want to be fair, but to be fair in music licensing while laudable, is not readily definable. Fairness depends on one's perspectives very often and one's interest, and there are clashes of valid but competing interests.

The small business owner who plays radio music over a speaker to improve the ambiance of his or her restaurant or store may believe that turning on the radio without having to pay a fee for music should be a personal right. But the composer of the music who's small business is to create music for public enjoyment expects and must be remunerated for the use of his intellectual property.

How do writers and publishers of music know when business establishments across the country are playing their music? I'm told that only 3 percent of music users volunteer to license copyrighted music. The other 97 percent of music users must be identified by the property rights organizations who then negotiate a licensing agreement.

We must be careful not to assume that all the proponents of H.R. 789 are small business owners, particularly restaurant owners. Some chain restaurants after all are large corporations. Some who strongly support this legislation do not even license the music they

use from the property rights organizations, such as the American Society of Composers, Authors and Publishers (ASCAP).

For example, Red Lobster and the Olive Garden rent background music from businesses like Muzak, who tape music for this purpose. Muzak has the licensing agreement with ASCAP, not these restaurant chains.

In cases of franchise restaurants, we're not talking about small business, that need protection. McDonald's and Pizza Hut are large corporations. Pizza Hut, in fact, has negotiated chain licenses with ASCAP for all it's restaurants, both the ones the corporation manages and the franchises.

McDonald's does not have a corporate licensing agreement, which means that the property rights organizations must survey each McDonald's Restaurant to determine if their music is being played, the frequency, and document its use. Chuck E Cheese used to license music for its restaurants, but decided not to continue in favor of finding the composers directly and paying them.

There's no oversight mechanism to ensure that restaurants do so. Before we in Congress jump to the conclusion that H.R. 789 would rescue small business owners from an alleged burden of paying copyright royalties for music they use, we must remember that the big winners from this legislation may well be the larger corporations that would gain a huge financial windfall from such an exemption.

When we contemplate taking away the royalties to which a music composer is entitled by law, I believe we must consider the level of burden that may be imposed on a business owner, whether it be small or large.

ASCAP has estimated that the average daily cost of a music license for the unlimited use of music in any form—radio, TV, tapes, CD's, or live—is $1.58 per day—but 80 percent of establishments pay less than $1.10 per day.

We should ask is this a burden? We must balance whether this burden of a $1.10 per day for 80 percent—more than 80 percent of the establishments is greater for the user, than is the burden for the music composer who had not received any kind of a royalty payment to which he is entitled by law.

Finally, the fairness issue also arises in regard to the mandated access to music repertoires of the music licensing organizations in printed form, a requirement that would have the organizations print out 4.5 million titles, along with the name, address, and telephone number of every writer.

The property rights organizations presently provide information via computers, the Internet, PC Modem, 800 telephone numbers, and by mail upon request. BMI also has its repertoire on CD Rom. ASCAP, I'm told, is in the process of doing so.

The information appears to be readily available to all users of copyrighted music, whether small or large businesses. We must also question whether such a mandated access requirement would be fair to the composers who have their phone numbers and addresses made available to the public through this legislation.

I firmly believe that it is imperative that we in Congress are presented with a balance of perspectives and positions on this complex issue. The many concerns raised by this proposed legislation under-

score the necessity of understanding the numerous complexities involved.

Madam Chair, that's why I wrote to you on two occasions—on April 18 and April 25—requesting three specific witnesses who I thought would add important perspective to the presentations. I do know we have four witnesses of one perspective, two of another today. But specifically the witnesses I asked for would be a witness from the National License Beverage Association, the organization which negotiated an agreement with ASCAP and BMI in November 1995 to present concerns about small business use of radio, TV, music.

I also believe we would have benefited and, therefore, requested a representative from the Church Music Publishers Association to learn how their perspective differs from that of the National Religious Broadcasters.

Now I understand that there are differences of opinion within both organizations, of course, as there is within the Democratic and Republican party, but the overwhelming position of the Church Music Publishers differs from the National Religious Broadcasters.

Finally, I especially think we would have benefited immeasurably if we would have asked Judge Harold Tyler, who is experienced in overseeing the ASCAP consent decree and its operations, to come and share the benefit of his considerable expertise with us, and I regret that my specific request could not be accommodated within one of the three. I look forward to hearing the witnesses.

Mr. ZELIFF. I would like to thank Chair Meyers for holding this very important hearing very vital to interests of small business, and would like to particularly welcome my good friend, Steve Barba, of the world famous Balsams Resort from Dixville Notch, New Hampshire.

I got to tell you that the Balsams is one of the quality resorts recognized around the world, even though you are a competitor of ours. It's great to have you here, and I look forward to your very knowledgeable testimony. If anybody knows this issue, you do, and thank you for being here.

As a small business owner myself with a country inn, Christmas Farm Inn in Jackson, New Hampshire, and another small business called Yesterdays in Jackson, I know firsthand the arbitrary nature of music licensing fees. I want to emphasize from the outset that I fully endorse the necessity for strong intellectual property rights protection in the music industry. Those who compose and perform musical works have every right to receive compensation for their efforts.

At the same time, I'm very concerned about evidence suggesting inconsistent, erratic, and heavy-handed music license enforcement practices of leading music licensing societies. Under current law, creators of music are allowed not only to collect fees at the source, but also each step along the way. Collecting compensation from both the radio station that plays the music and the local tavern that keeps the radio on as background music, for instance, is double-dipping in my judgment, and it's wrong and it's unfair.

Moreover, there's not any evidence that the enforcement of contracts for the holders of these music copyrights resembles a monopoly. Increases have been demanded despite existing contract terms,

only "blanket" licenses have been offered and the existence of a single court of appeal, namely, New York, discourages dispute resolution which can bankrupt a small business.

As a result of all of this absurdity, I have worked closely with my colleague, Representative Sensenbrenner from Wisconsin, to make music licensing fair. Representative Sensenbrenner's bill, H.R. 789, will allow small businesses to play incidental or background music on radios or TV's without paying licensing fees. Those are the royalty fees paid to licensing organizations for the right to play music.

Think about it, the last time you were at your favorite diner for breakfast and you heard Michael Jackson's latest hit song, did you say to yourself, "Gee whiz, I hope this diner is paying Michael Jackson to play this song while I eat my eggs?" I don't think so.

Under current law, the American Society of Composers, Authors, and Publishers, ASCAP; Broadcast Music Incorporated, BMI; and other music licensing organizations can demand payment from almost any music played in a place of business, be it live or rebroadcast, and no matter how many times it has already been paid. This means that if any diner, hair salon, or other small business plays a radio or television, a licensing representative can demand a royalty. That goes for music coming over boom boxes and cassette and CD's.

The bottom line is that there is no reason at all why small businesses across New Hampshire and the United States should have to pay just to have the radio playing, and I don't believe that that's fair, and I think it's just plain wrong. That's why I'm supporting and working hard to pass H.R. 789.

In closing, I'd like to commend the National Restaurant Association for their hard work, diligence and dedication to bring this issue forth. I want to thank all members of the Music Licensing Fairness Coalition for addressing this issue of great importance to small business owners. I look forward to the remaining testimony.

Again, I want to repeat, those who compose and perform music works have every right to receive fair compensation. My good friend, John LaFalce, I heard you talk about level of burden. I own three small businesses. I know what a level of burden is. I signed the front page of that paycheck, and I'll tell you, there's a big level of burden. Whether it's a $1.58 or a $1.10, everybody's nipping at the heels of small business, and we're going to bite the hand that feeds us.

Businesses create jobs. If it's not fair, we ought to straighten it out now. Again, give fairness on both sides of the issue. I look forward to the remaining testimony.

[Mr. Zeliff's statement may be found in the appendix.]

Mr. SKELTON. Mr. Chairman, don't you think we ought to have some background music for this hearing?

Mr. ZELIFF. I could always count on you to come up with a common sense solution. Are you going to pay $1.58 or $1.10?

Any other Members on either side of the aisle care to make an opening statement?

Mr. POSHARD. Mr. Chairman, I ask permission to offer an opening statement for the record.

[Mr. Poshard's statement may be found in the appendix.]

Mr. ZELIFF. Certainly.

Mr. HILLEARY. Mr. Chairman, I'd like to just welcome Danny Casey from Nashville out here in the audience. He's with the Church Music Publisher's Association, from Nashville, and welcome Pat Alger. If you're not a Pat Alger fan, then you're not a Garth Brooks fan. Because he writes a few songs for Garth Brooks, and he's out of Nashville, and I just want to welcome you to Washington today.

Mr. ALGER. Thank you.

Mr. ZELIFF. Anyone else wishing to make a statement? I'd like to introduce the first witness.

Mr. Rule is a respected member of the antitrust bar and partner in the Washington DC firm of Covington & Burling. He's a former Assistant Attorney General who was in charge of the Antitrust Division of Department of Justice during the final years of President Reagan's second term. So, Mr. Rule, if you can condense your testimony and submit the balance for the record.

**TESTIMONY OF CHARLES F. RULE, COVINGTON & BURLING**

Mr. RULE. Sure. Thank you. It's a pleasure to be here. I appreciate that introduction. I am here today at the invitation of the Committee, and I'm not representing any client. Perhaps one could say it's an unwise thing for a lawyer to do, but I'm here, nevertheless. I am here in part, I assume, because of my experience in the Antitrust Division of the U.S. Department of Justice as the head of the Division in the 1980's when we administered the so-called "ASCAP and BMI decrees."

Even though I'm here and the views I express are my own, and not those of my partners or my clients, I do want to just mention that one of my partners, Neil Roman, on behalf of the NFL, has submitted a statement on the legislation. I understand that will be in the record, and I just want to say that generally I agree with the sentiments of that statement, which is that, "if you're going to address fairness in musical licensing, it's important to craft the bill or the legislation in a way that focuses in on nondramatic copyrighted musical works and to avoid sweeping other things like professional sports broadcasts into the scope of the exception from the copyright protection."

Basically, today I deem my role as trying to provide a little background in terms of the ASCAP and BMI decrees and to speak to some extent to the options that face restaurant owners and others who may not be satisfied with protection provided by decrees. My own personal view is that if the Congress or society in general believes that there is a problem and that small business owners are somehow being abused by ASCAP and BMI—and I say "if," because I'm not personally convinced that that's the case—but if that is the case, then I believe legislation is the appropriate mode of solution.

Whether one loves or hates ASCAP and BMI, it's hard to imagine an effective system of copyright protection for musical compositions in this day and age without some enforcement organization like them. From 1897 when copyright owners first got the right to control public performances until 1914, it was effectively impossible for copyright owners to enforce their rights under the statute.

The void was filled by ASCAP, which was formed in 1914 by a group of composers. As a practical matter, it turned out to be quite a boon. ASCAP generally, and it's been recognized by the courts and others, is an efficient mechanism for licensing a large group of copyrights owned by a large group of owners to a large group of potential licensees. In the absence of some kind of mechanism or clearing house like ASCAP and BMI, a role that they filled, the cost of trying to negotiate those thousands upon thousands of individual licenses would be prohibitive, and copyright owners would never get a return on their investment in the copyrighted works.

Nothing, of course, is perfect in life, and neither is ASCAP/BMI. While it may be an engineers model of efficiency, it's an antitrust lawyer's nightmare, in terms of reduction in competition.

As a practical matter, in order to work, ASCAP has to bring together a lot of potentially competing copyrights and in effect, issue a single license for all of them. As a practical matter that means that historically there has not been, as in most other industries in this country, a lot of competition and competitive constraint in terms of the prices that ASCAP charges.

Not surprisingly against that background, ASCAP and subsequently BMI have been subject to a great deal of antitrust litigation. The decrees against ASCAP were first entered in 1941, subsequently modified in 1950, and those decrees ever since have, in effect, been an attempt to regulate the fees in a way ASCAP licenses and BMI licenses their copyrights.

Apparently, small businesses feel that it's not working effectively. In my statement, I have mentioned some of the alternatives that are open to the restaurants and others to protect their interests. They can bring antitrust suits, though, looking at the law, one would have to say their likelihood of success is not great. They could bring a copyright misuse action, though again there are problems in the law in bringing that kind of action. They could try to persuade the Antitrust Division to modify the decree to provide relief. But to do that, the Antitrust Division would also, in effect, have to bring a new antitrust action that would be difficult, expensive, and the outcome would at least be in doubt.

None of these options makes as much sense as legislation. On the other hand, I think the question whether or not legislation is in order is very difficult, and it's one that's very hard to answer in the abstract. It's also very hard, I believe, for courts to answer; and it's also one of the difficulties, I think, the rate court has had in terms of establishing fees.

On the one hand, if a restaurant improves its ambiance and its business as a result of being able to play background music and, therefore, profits from that, it's hard to argue that copyright holders don't deserve to share in those profits. On the other hand, the difficulty of collecting royalties and the increased cost may provide additional incentives to copyright holders that at the margin aren't necessary. Maybe we're investing too much in copyrights. On that basis, it may be appropriate to, with respect to the incidental playing of background music, to restrict the rights of copyright holders.

But, from my perspective, at least from an antitrust lawyers perspective, there's no obviously correct answer to the conundrum. Rather it's an essentially political question that best results in a

political forum, Congress. I wish we could help as antitrust lawyers, but I think that you're on your own on this one. Thank you.

[Mr. Rule's statement may be found in the appendix.]

Chair MEYERS. Well, we were looking to you for the answer, Mr. Rule, so I'm sorry. The hearing's over. Mr. Barba is our next witness, and he runs a hotel and a restaurant in New Hampshire and I believe is a constituent of Mr. Zeliff's.

Mr. ZELIFF. He's a future constituent in the—but I just want to again just say that he runs one of the most quality operations in the world, and I have tremendous respect for Steve Barba.

Chair MEYERS. Mr. Barba.

## TESTIMONY OF STEPHEN P. BARBA, THE BALSAMS GRAND RESORT HOTEL

Mr. BARBA. Madam Chair and members of the Committee, today is an important day. My name is Stephen Barba, and I want to say thank you, first of all, for hosting this important meeting and a special thanks to Bill Zeliff, my friend for many years now, for all those kind remarks.

Bill succeeded me as President of the New Hampshire Travel Council and the New Hampshire Lodging and Restaurant Association. As a resort owner, himself, probably more than anyone on the Committee, he understands my frustration with this issue and has been one of the best proponents for fixing the problems that exist with the music licensing societies.

I am the President and Managing Partner of the Balsams Grand Resort Hotel, a 212 room seasonal high in the white mountains near the Canadian border. We're a destination resort in our 131st summer season, with three rooms of live music and entertainment each night. Our hotel is in a very remote area. In fact, the nearest stop light is 50 miles away. You may have heard of my town, Dixville Notch, we're the folks who vote first in the New Hampshire primary and the national elections. We take no responsibility for that though. Dixville Notch may be a small town of 25, but we know a big city racket when we see one. That's why I came here today to tell you why America's music licensing system is well overdue for reform.

My own experience started at the Balsams, began as a caddie, at the caddie camp 37 years ago. I have spent my entire life in the hospitality business at the Balsams. I've dealt with almost every kind of contract and supplier and vendor imaginable. I can honestly say that I have never had a business relationship that comes close to resembling the one I have with the music licensing societies: ASCAP and BMI. It's completely one-sided. They bill us, we are forced to pay without knowing how they set their rates, we have no practical way of contesting a fee that we think is unfair. In my business, I've come to find that it's too expensive to whistle while I work.

As you can see, I'm not alone in my belief. There's a lot of restaurant operators behind me today, and today I speak for hundreds of business owners in my own State. As a past Chairman of the American Hotel & Motel Associations National Resort Committee, I have heard the same complaints over and over from colleagues

around the country about the unfair pricing and strong-arm tactics of ASCAP and BMI.

Consider the case of my good friend, Fritz Koeppel, a New Hampshire hotel owner who was approached by an ASCAP investigator. The inspector said Fritz's piano player had sung Zip-a-dee-doo-da on request, an ASCAP licensed song—this happened the night before—and ASCAP hit Fritz with a lawsuit for $50,000.

Before I go on, let me make one thing clear. My complaint is not with the song writers of this country, they certainly have the right to collect royalties; but the question is: How many times can they collect for playing the same song?

My only eye-opening introduction to music licensing came in my very first year of management at the Balsams. I was in my lobby office one morning and 3 men in T-suits appeared. They had stayed overnight and heard music being performed in one of our nightclubs. They said that they were from ASCAP and that our live band was playing songs copyrighted by ASCAP artists.

Right away they started threatening my partner and me with a lawsuit. They demanded we sign a contract with them immediately and start paying for licensing music at their rates, and what if I didn't want to pay their fee we asked? They said the only way we could challenge this fee was to initiate a lawsuit in one single court in New York City, a lawsuit they have never lost they told me, a ridiculously expensive prospect for any business owner. With the lawsuit and a potential penalty of $20,000 per song hanging over our head, we eventually signed.

Today we pay a total of $10,752 each year to ASCAP and BMI, and we can't fight them because it cost more in legal fees than to pay their invoice. That is why thousands and thousands of business people like me are imploring Congress to act on this issue.

We support the bill, H.R. 789, that would instill some common sense and fairness to music licensing. I want to point out two reasons why I support the bill.

First H.R. 789 would stop licensing groups from double-dipping on fees. Right now ASCAP and BMI can hit up a hotel or restaurant for licensing fees on background music that comes over television and radios. That's patently unfair, in my opinion, because the rights to use that music have already been paid for, usually many times over, by television and radio stations. To then charge us for something as incidental as a jingle on a television commercial that we neither knew would be played nor was the purpose for turning the television on smacks of opportunism.

Let me give you an example to be sure you understand what I mean by "double-dipping." Think about when you see my alma mater at Michigan State's marching band play a song at halftime on nationally televised football games. Now just how many times ASCAP or BMI collect fees when that song is played over the air. Not once, twice, three times; but they collect fees five times from five different sources once each from the station, the national network, the local station, the local cable or prime star system, and finally from a bar that is showing the game. That's not double-dipping folks, that's quintuple-dipping.

Second, I'm glad that H.R. 789 would set up a fair arbitration system. This is of particular importance to me. Right now music li-

censers have free rein to set and raise fees. They hold the threat of a lawsuit over you're head until you pay, and the only place to challenge their invoice is in a single New York courtroom. Unless you have the money to hire lawyers and fly to New York, you're forced to pay what they say and keep your mouth shut.

H.R. 789 would stop this practice. It sets up a fair third-party arbitration system whereby a business could settle any contract dispute in their own State without having to hire lawyers and fly all the way to New York City.

Last October I and some colleagues in New Hampshire met with some representatives of ASCAP and BMI in our State capital, Concord. We discussed our differences of opinion, but could not work out any mutual acceptable solution. As a result, I believe H.R. 789 is a necessary step in the right direction. That's why I wrote a letter to my local newspaper explaining why Congressman Zeliff is right to support this bill. Guess what happened on January 31, of this year? An ASCAP representative arrived at my place of business to audit my books to see if more money was due to them. Yes their contract with us, which essentially demanded on a "take it or leave it" basis gives them the right to audit my books just like the IRS. The audit produced additional fees of $911 plus interest of $693 figured at 1½ percent monthly or 18 percent per year.

From day one, ASCAP and BMI have misrepresented this legislation. It's silly to suggest that this bill will stifle the next generation of songwriters, hardly. Songwriters and licensing societies will still be compensated handsomely from broadcast networks, cable satellite systems, and from businesses like mine, that provide entertainment through live and taped music.

It's clear that ASCAP and BMI need to be reined in here. State governments have already started recognizing this in limited ways. In the past year alone, at least 16 States have passed laws cracking down on some of the business practices of these groups. Now it's Congress' turn to address the larger picture. I ask you to move forward on H.R. 789, and I thank you very much for your consideration.

[Mr. Barba's statement may be found in the appendix.]

Chair MEYERS. Thank you, Mr. Barba. Our next witness is Mr. Alger, and he is a Songwriter from Nashville, and a member the American Society of Composers, Authors, and Publishers, ASCAP.

### TESTIMONY OF PAT ALGER, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP)

Mr. ALGER. Thank you. As you said, I am from Nashville, Tennessee. I have been a member of ASCAP for my entire career. I am also President of the Nashville Songwriters Association International. I've written a lot of songs, some of them you might be familiar with like "The Thunder Rolls" and "Unanswered Prayers" for Garth Brooks, "Small Town Saturday Night" for Hal Ketchum, and quite a few others I'm happy to say.

It is fitting that I testify before the Small Business Committee because I'm about the smallest businessman you'll find. Songwriting is my profession, and it's my livelihood. What I have to say would apply to almost any songwriter from the most successful, to

the young dreamers out there who are trying to write their first hit.

I say I am a very small businessman because I have no one other than my co-writers to help me earn my living. I don't have a staff and I don't have a secretary. I don't have a factory. If I'm not able to go to work on a particular day, there isn't anybody to substitute for me. The intangible product that I make comes solely from my mind. For me to be successful with a song, or intellectual property, I have to leap some pretty enormous hurdles.

In the beginning of their career, songwriters must find outside work to support themselves while they train for the music professor. After they've worked their magic and put words and notes together, they've got to find a publisher to publish it; and you've got to find an artist to record it or perform it. Then, they've got to hope and pray that radio is going to broadcast it.

When my songs are successful and businesses use them to enhance their appeal to the public, and make money from them. When my songs are used in the restaurant in Ohio or hotel in New Hampshire, it is because they think that music will help their businesses by attracting and entertaining new customers. Oliver Wendell Holmes said this many years ago that, "If music did not pay, it would be given up."

Payment for use of my musical property is what enables me to stay in business, and I think payment for music property is a pretty key element to our country's economic system.

There's no way that the new songwriter can individually know what businesses are using his music. There's no way that he can individually collect from these businesses even if he knows who was using it. There's also no way I can deal on a level playing field with powerful businesses like chain restaurants and broadcasters. That's why songwriters, together with their publishers, formed ASCAP in 1914. ASCAP and similar organizations, BMI and SESAC, find the users of our music and license them at a fair fee.

As Mr. LaFalce noted, restaurants and taverns licensed by ASCAP currently pay an average of $1.58 a day to use all of ASCAP's repertoire of about 4 million songs. That's less than the cost of a drink. Eighty percent of them pay only $1.10 a day. These music users say that there's something unfair about this system, and I can't believe it's the price.

The restaurant owners behind pending unfair legislation started by asking for a complete exemption if they got music from radio broadcasts in order to enhance the atmosphere of their places. First, they said my music was just incidental to their business. Well, let me say that no songwriter that I know of wakes up in the morning, goes to the office or wherever he does his creating and says, "today I am going to write some incidental music that nobody wants to pay for." In every restaurant or tavern you'll find parsley on the plates, pictures on the wall, and some flowers and tablecloths on the table. All these things are incidental, but, incidentally, they're all paid for.

We've always believed that this is a market place dispute between users of property and the owners of property and should be decided in the market place. All attempts by ASCAP to sit down

and work something out with the National Restaurant Association have been met with a stonewall.

However, as Mr. LaFalce mentioned, the National Licensed Beverage Association which had initiated this legislative effort agreed and did want to work something out. An agreement has been reached that would clarify the existing law and, according to Congressional Research Service, exempt about 70 percent of the restaurants and taverns in this country. I think that's pretty impressive. It's regrettable that they're not here to speak about that agreement, because I think it would be very enlightening.

The other group behind this legislation is the National Religious Broadcasters. These owners of religious format stations are operating commercial enterprises which use our music in making really huge profits. ASCAP's license fees are just a tiny percentage of their gross revenues. Using the word "religion" should not relieve them of their obligation to pay for music. Christian music should not be valued less than any other music. To exempt religious broadcasters from paying performance fees would make the Christian songwriter an endangered species.

My music is all I have. It's what I rely on to feed my family, and it's the future that my son will have, hopefully, to carry on. It's my property. The owners of restaurants and religious broadcasters testifying before you today want to pass legislation that amounts to taking my property. Surely this Congress, in particular, believes in market place decisions and is opposed to the taking of private property. I hope that you won't let these powerful interests run roughshod over the thousands of small businessmen like myself, who work hard everyday to create America's music. Thank you.

[Mr. Alger's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Mr. Alger. Our next witness is Mr. Epperson, and he is Vice Chairman of the National Religious Broadcasters, and he's here with us today from North Carolina. Mr. Epperson, and I will ask all of the witnesses, they've been doing a very good job so far, if you would get very close to the microphone, because we can here you up here but the speakers are in the back of the room and sometimes we loose your voice at the back. Thank you.

## TESTIMONY OF STUART EPPERSON, VICE-CHAIRMAN, NATIONAL RELIGIOUS BROADCASTERS

Mr. EPPERSON. I'm delighted to be here, Madam Chair and members of the Committee. On behalf of the National Religious Broadcasters Music License Committee and over 700 radio stations we represent, I want to express our appreciation for the time you are devoting this morning to music licensing issues. As a radio station owner and First Vice Chairman of NRB, I can personally attest to the abuses of monopoly power our members suffer at the hands of the music licensing organizations.

Our opponents at this table have argued that our differences are just disputes that should be settled by the courts, not by Congress. Nothing could be further from the truth.

The problem we face is fairly simple. ASCAP and BMI are Government sanctioned monopolies and any time the Government confers that kind of power on private organizations, we believe that

Congress has a duty to regulate it. Unfortunately, a previous lack of oversight by the Justice Department and an abuse of policy direction and absence of policy direction from Congress has allowed these organizations to continue abusing music users in the broadcast industry. It has led to court cases lasting 10 years or more over the interpretation of the consent decrees which were written 50 years ago.

The answer's not more litigation. ASCAP alone is involved in over 500 pending cases, we understand, right now. This is a system that is clearly broken, and Congress needs to fix it.

H.R. 789, which was introduced by Representative Jim Sensenbrenner and now cosponsored by 170 of your colleagues from both sides of the aisle, addresses two problems that our members believe are critical. The first is a requirement that the music licensing monopolies offer a per program license to radio broadcasters that is a real economic alternative to the blanket license favored by ASCAP and BMI.

The other provision is the requirement that each music licensing organization provide online access to the repertoire of works for which it is authorized to collect license fees.

These provisions of H.R. 789 introduce an element of fairness by allowing specialty radio broadcasters who play little copyrighted music to pay only for what they use. This is all we've ever asked, to pay for what we play.

Furthermore, ASCAP and BMI would be prevented from suing music users for copyright infringement over songs they failed to list on their online data bases.

If Congress passes H.R. 789, we'll finally have a licensing system that resembles free-market competition. Radio stations will be able to manage their costs more efficiently, either by choosing to play less copyrighted music or by playing more songs from a lower-priced music licensing organization.

These are the very reasons ASCAP and BMI are fighting so hard against H.R. 789 and some of those in the Senate. Competition is apparently not in their self-interest. Over 15 years our Committee has tried to negotiate these two points. For 15 years we have had absolutely no success. ASCAP and BMI have refused to budge.

Let me give you an example of how the licensing system works today.

Most radio stations operate under a blanket license which gives them the right to play copyrighted music whenever they choose. Special broadcasters represented by my organization use very little music so we try to operate under a per program license which assess the fees based on how much of our program periods contain copyrighted songs each day. Licensing fees in both cases are charged as a percentage of the station's gross revenues except—and this is the big problem—the per program rate is several times higher than the blanket rate.

Let me illustrate. My company owns WAVA here in Washington DC. Our format is mostly Christian teaching and talk, but certain programs may feature a copyrighted song so we've opted for ASCAP's and BMI's per program license.

Do we pay just for the use of a particular song we play? No. ASCAP and BMI charge us a percentage of the revenues attrib-

utable to the entire program period whether we play 1 song or 20 songs.

Are we charged the same rate as stations that play music all day long? No. If we try to use the per program license offered today and we play 1 hour of music they would charge us for 3 or 4 hours. Thus, if more than one-third of our programs contain copyrighted music we could end up paying more than the rock and roll station across the street that broadcasts music 24 hours a day.

There's also an absurd amount of paperwork ASCAP and BMI requires to produce for the right to have our version of a per program license. We must log every single song we play 24 hours a day, 7 days a week. These reports must be sent to ASCAP and BMI each month, and they must be 100 percent accurate or we are subject to substantial monetary penalties. It's just another obstacle, another disincentive to using the per program license.

Why would anyone treat their customers this way, when we've just heard that a composer wants us to play their music? Well, it's a good question. ASCAP and BMI do it because it's simpler and more lucrative to force as many stations as possible to buy the blanket license and they are after all monopolies. They get away with it because there's no competition. We have nowhere else to go to shop for their music.

I have to tell the members of this Committee that our broadcasters deeply resent this unfair coercive system and respectfully implore Congress to pass H.R. 789 this year. Religious broadcasters in particular are beginning to view the obstructive stance of ASCAP and BMI as part of a larger battle with the entertainment industry.

We think to ourselves, every time we pay a religious artist, they get paid once, yet we are forced to pay ASCAP and BMI three or four times. What's going on? Where's our money going? Does it fund acts that are morally offensive to our listeners and to most other Americans?

Religious broadcasters, classical music broadcasters, and talk radio—none of whom use much of ASCAP's and BMI's product—would be grateful for your help in passing this bill. We are not anticopyright. We are not antisongwriters. We want to encourage religious songwriters. We merely want to pay for what we play. Again, Madam Chair and members of the Committee, thank you for your attention to this difficult issue.

[Mr. Epperson's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Mr. Epperson. Our next witness is Mr. Berenson, and he's with us today on behalf of BMI. He is the Senior Vice President and General Counsel. Mr. Berenson.

## TESTIMONY OF MARVIN L. BERENSON, ESQUIRE, SENIOR VICE PRESIDENT AND GENERAL COUNSEL BMI

Mr. BERENSON. Madam Chair, Members of the Committee, thank you for this opportunity to testify today on copyright protection. I come here today representing BMI's affiliated songwriters, composers, and music publishers. It is important to realize that BMI represents the songwriter, not the performer. For example, most people have heard of the song, "New York, New York." I would ask

people sitting up there, who wrote it? Probably very few people would be able to respond with the correct answer. The answer is Fred Ebb and John Kander. They write songs. They don't perform. These songwriters rely upon the royalties they receive from BMI to support themselves.

You have heard and will probably continue to hear a fair amount about the plight of small business people. I trust that you will acknowledge and embrace the fact that as a genuine entrepreneur, the average songwriter is no less a small business owner than any tavern, inn, or restaurant proprietor. Indeed, songwriters are the ultimate small business people who are able to take nothing more than an idea and transform it into something of value.

This hearing today is very important, in our view, because it represents the first formal public opportunity to discuss a very important breakthrough pertinent to copyright protection and music licensing that will be very welcome news for the small businessmen and women in the hospitality industry. The breakthrough that I allude to occurred several months ago when the National Licensed Beverage Association, BMI, and the other two performing rights organizations negotiated a compromise on qualifications for exemptions for music licensing fees. Indeed, under this progressive but prudent agreement, the cost of doing business would improve for thousands of bars, restaurants, liquor stores, and other small business establishments that play radios and televisions for the enjoyment of their customers. I should, however, stress that this initiative was a compromise. It's important to remember.

In my limited time I would like to outline for you the following: What we believe the issues to be, and what offers we have made in our efforts to be pragmatic without giving away something that is not ours to give away, nor anyone else's to take away, a person's intellectual property.

First perhaps as background, I should touch on the nature of and need for what is known as a public performance license. As you know, the U.S. Constitution recognizes the rights of creators of intellectual property, including those who create music. American music is beloved not just in the United States, but around the world. The inherent property right of a musical composition is no different than that of any sort of tangible property that one can see or touch and merits the same degree of property protection.

The songwriter relies on public performance royalties for his or her livelihood. To simplify the concepts involved here, when a writer's copyrighted song is publicly performed, those who use that music must pay for the use of the intellectual property. If someone is publicly performing copyrighted music in a commercial setting, then that music user needs to obtain permission for the use of songwriter's property. This is their property. This is no different than the use of anyone's property in a commercial setting. For music, this normally takes the form of a licensing agreement.

It would be nearly impossible for the songwriter to identify everyone who is using his music in a commercial setting, and to identify each of the songs that are being performed. The administrative costs for such an undertaking would drive the costs of licensing music sky high. Hence, the performing rights organizations offer what is commonly called a "blanket license." That is a flat fee paid

by the music user which entitles him to use any of the works in our repertoire—which in BMI's case is approximately 3 million works—over radio, television, CD players, stage, and know that they are not infringing on any of the rights of any of our affiliates.

It is not a perfect system, as previously testified, but it has worked well for the songwriter and the music user, both in the United States and worldwide. This is a system that's used in every other country that has a copyright regime. BMI and ASCAP are required under their consent decrees to basically treat similarly situated users the same. That is, a restaurant in California will pay the same licensing fee rate as that of a restaurant in Maine.

During a good part of last year, under the aegis of the House Judiciary Committee, we along with ASCAP and SESAC, met with members of interested groups that formed a coalition supporting the legislation introduced by Mr. Sensenbrenner. This bill would, in fact, exempt commercial enterprises from copyright liability for music which enhances their business, if that music is performed via television or radio. Enactment of H.R. 789 in its present form would deny songwriters and composers a large portion of their livelihood, while allowing restaurateurs the use of this property for free. I ask, and this is suggested by means of example regarding the claim that music is incidental to the restaurant business, that parsley I think, was mentioned before as incidental to the restaurant business. Everyone's gone into a restaurant, you get your plate, your dinner's on it, and there's a piece of parsley sitting on there. I would venture to say very, very few people eat the parsley. But would Congress say, "Well, since parsley is incidental to the restaurant business we should legislate that parsley growers should be forced to donate the parsley to the restaurant for nothing?" I would think not.

But let me go into the agreement which—let me go into the agreement which was reached with the National License Beverage Association, and that is as follows: Any establishment smaller than 3,500 gross leasable square feet would be exempt, no matter what they had in there. If we had a hundred speakers and hundred televisions, if the establishment is less 3,500 square feet, they don't have to pay a license fee.

Any establishment using six or fewer speakers with no more than four speakers in one room, would also be exempt, if it was over 3,500 square feet.

In an establishment—eating and drinking establishment using six or fewer speakers with no more than four speakers in any one room, would be exempt.

Any commercial establishment using three or fewer televisions of 55 inch screens, that's a large TV, with no more than two televisions in any one room would also be exempt.

This is the basis of a settlement that was reached with the National Licensed Beverage Association. The Congressional Research Service conducted a study on the figures in this compromise and concluded on the basis of size alone, just that 3,500 square feet aspect, about 70 percent of the eating and drinking establishments would be exempt under this proposal. If you add in the equipment exemptions, meaning the size of the screens and the number of speakers, even more establishments would be exempt.

We, the performing rights organizations did a lot. We increased the current exemption by a little more than 300 percent.

Now, we have attempted, meaning BMI and I know ASCAP and SESAC, have attempted to negotiate an agreement with the National Restaurant Association and some other members of the coalition. Our overtures to increase the size of commercial establishment qualified for exemption from licensing requirements, increase the size and types of equipment and other offers, were unacceptable to the NRA. What was even more frustrating was the NRA feedback that we received was almost a "our way or take the highway" style approach. They wanted to legislate. They did not want to compromise. Needless to say, we have still been unable to reach an agreement with that powerful trade association.

I would like to just make mention, and I'm almost done, the fact that if H.R. 789 were to pass, it would have implications internationally. We are members of the Berne Convention which requires copyright protection, and if we were to pass something such as this, we have proof from some performing rights societies that they would probably go to the WTO and claim that we would be in violation of our treaty obligations.

Now, I would like, if I could, to just address something that Mr. Epperson said, and Mr. Epperson and I have known each other for a lot of years, too many years. In terms of the religious broadcaster issue, we ask why should the songwriter be denied payment for his property when the broadcaster either accepts advertising or sells air time to a ministry? The broadcaster is a profit-making organization. Should creators of religious music be penalized because of the fact they are writing religious music? We don't think so.

I would like to address, if I may, one of the comments that was made by Mr. Epperson, namely, that there should be a per program license alternative and that it should be an economic alternative.

Prior to today's appearance, I looked at some of the same stations which Mr. Epperson is associated with. Most of the stations operate on a BMI per program license. Without giving specific numbers of the license fees, unless Mr. Epperson agrees that I can publicly disclose them, and taking only a few of the stations, WYLL located in Illinois averaged a savings by using the per program license of over 62 percent of what they would have paid on the blanket license fee. Another station, KFEX–AM California, averaged a savings of over 83 percent of what they would have paid on the blanket license fees. KBAR–AM averaged a savings of 42 percent. WMCM–AM in New York, excuse me, New Jersey, sorry, averaged 91.8 savings over the blanket fees by using the BMI per program. It is definitely an economic alternative and is a viable one. You can't get much more of a savings than 91.8 percent, unless you get it for nothing.

I hope that I have helped shed some light on these issues and I welcome any questions that you have.

[Mr. Berenson's statement may be found in the appendix.]

Chair MEYERS. I'm sure there will be questions, Mr. Berenson. Our final witness today is Mr. Tavenner. He is with us today from just up the road, in Olney, Maryland. He runs a restaurant named the Silo Inn and is appearing today on behalf of the National Restaurant Association. Mr. Tavenner.

## TESTIMONY OF TOMMY TAVENNER, PRESIDENT, SILO INN

Mr. TAVENNER. Thank you, Madam Chair and distinguished members of the Committee, thank you for having me here today.

My name is Tommy Tavenner, and I do indeed own the Silo Inn in Olney, Maryland. My dad opened a restaurant back in 1965, 31 years ago, when Olney wasn't a whole lot more than a single intersection. As the town grew up around us, we grew too. We now have about 50 employees at our restaurant and pub. I am testifying today on behalf of the members of the National Restaurant Association.

First, let me say that I'm a musician and an amateur composer myself. I wish I could say I have gotten far enough to be licensed with ASCAP or BMI, but I haven't. Hopefully, some day like Congressman Bono, I'll have my own hit song.

I've paid licensing fees to ASCAP and BMI for nearly 30 years now. For 2 nights of live music a week, we pay more than $2,400 a year, considerably higher than a $1.50 a day. Sometimes I feel like the biggest fool in Maryland. I have no idea what I'm paying for or why I pay for what I pay. I have a file as thick as an encyclopedia showing my efforts to understand the rates. Included in that file are what I call "the New York lawyer letters." Letters threatening me with lawsuits for failing to pay what I'm told to. It's a strange way of doing business. Unfortunately, current law appears to let the music licensers get away with it.

"Scam" is a harsh word to use, but I've heard enough to convince me it's not inappropriate for describing what is happening to us in the small business community. Let me share a few stories, including some from colleagues who have taken time to be with us today, two colleagues from Virginia, Tom Jackson, who owns Shooter McGees in Alexandria. It took him 3 years and the lawyer to finally prove to BMI that he shouldn't have to pay for karioke, a dance floor, and a 200 seat restaurant; because he doesn't use karioke, doesn't have a dance floor, and seats only 70 people.

Let's take Calvin Scvillee from Whitey's in Arlington. When the ASCAP representative first visited him and told him what he owed he said, "Fine." Then he asked for a written bill. The ASCAP representative wrote down a bill on a napkin and handed it to Calvin. Although ASCAP and BMI have spent thousands of dollars on ads trying to convince you these problems don't exist, they do.

Litigation threats and abusive collection I've cited are real. I did not make them up. They actually happened. In fact, they are happening every single day in small businesses around the country.

That's why 2 years ago the National Restaurant Association joined with a broad coalition including the National Retail Federation, the NFIB, and others to ask Congress to make some changes.

Our courts of law recognize that whenever a handful of companies control one market, there's a potential for abuse. That's why ASCAP and BMI currently operate under court orders. Unfortunately, however, the last 40 years have shown that these orders don't provide any real protection.

If you don't understand the fees, if you object to being charged one fee while the business down the street is paying a wildly different rate, or if you can't get a straight answer about what each

music society represents, you have just one option: To file suit in one Federal court in New York City.

To use the word "arbitrary" in describing the fees and tactics is the ultimate understatement. In my case, it took me 3 years to get ASCAP to reduce my fees when they decreased our music program. For the last 3½ months, I've been trying to get a credit I've been entitled for overpayment in 1995. I can cite example after example like this.

But you learn quickly that if you question anything, a lawsuit threat isn't far behind. Over 60 percent of National Restaurant Association members surveyed recently say they have been threatened with lawsuits or other pressure tactics to get them to pay.

Like most small businesses, I don't have a lawyer on staff. I either have to rely on my own savvy or hire a lawyer. Madam Chair, as a small business owner, I simply don't have the resources to go up against an army of ASCAP or BMI lawyers and a rate court in New York City. It's David versus Goliath.

We need a system that works better for the little guy. I am here to ask you to support H.R. 789. H.R. 789 would make it clear that businesses are not required to pay licensing fees when they flip on a radio or TV in the background. ASCAP, BMI, and SESAC already collect millions from radio and TV broadcasters. To get a business owner to pay up because of something we have in the background, like a commercial jingle during a TV show is excessive.

Second, let's find a way to resolve fee disputes in the location where we do business. H.R. 789 would let us take our problems to and get them resolved by a third party arbitrator. This is fair. The music societies say this is unacceptable. They want to force all small business music users in every State to go to the court in New York City.

Third, let's make sure businesses can get information. Right now any small business that tries to save money by playing music from just one group's song is out of luck. H.R. 789 requires the music licensers to give us access to paper and online lists of their songs.

I also want to tell you what H.R. 789 does not do, because I think there's a lot of misinformation. It does not exempt any business from paying licensing fees for CD's, tapes, or live music. It doesn't deny songwriters royalties.

Let me add one last thing. The National Restaurant Association, the NFIB, and all the members of the music licensing coalition have been working to find a resolution both sides can live with. The National Restaurant Association and the coalition do not support the agreement made with the National License Beverage Association.

Contrary to what you'll hear today, a majority of the restaurant industry would not be covered by that NLBA deal. It proposes an extremely narrowed business exemption for radio and TV.

BMI, ASCAP, and SESAC like to portray us as a bunch of greedy small business owners trying to deny fees to songwriters. I'm willing to bet that if any songwriter came to my restaurant and got some idea of the way ASCAP and BMI charge and collect fees, they'd know why I am sitting here today.

I had to think long and hard about speaking out today against the copyright establishment. I know it could have ramifications. But I have faith in the system, which is why I'm here.

Madam Chair, thousands of small businesses have paid the piper for years. That's not the issue. The issue is whether we live under the rules of law that are clear and fair, or under arbitrary rules of ASCAP, BMI, and SESAC, who for all practical purposes are accountable to no one.

I thank you for the time, and I'd be happy to answer any questions.

[Mr. Tavenner's statement may be found in the appendix.]

Chair MEYERS. Thank you, Mr. Tavenner. We appreciate your testimony very much. There are a number of members who have asked to submit a statement for the record, and they have asked to keep the record open for additional questions to witnesses. So, without objection, the record will be held open, and all statements will be accepted for the record.

Chair MEYERS. At the beginning we heard from the author of this legislation, Mr. Sensenbrenner, and in the spirit of fairness, Mr. Bono is here and has asked to be heard. So, we'll probably start the lights on you Mr. Bono, and we will hear from you, and then we will go to questions.

Mr. LAFALCE. Do we have to pay to listen to Mr. Bono?

Chair MEYERS. Yes, we do have to pay today.

Ms. KELLY. Only if he sings.

Mr. BONO. Thank you, Madam Chair. I would just like to—first of all, I've been a restaurant owner and had several, and I'm also a songwriter. So, I have never experienced these days of—or nights of horror that some of the other restaurant owners have experienced. I'm not saying that they haven't happened, but I've never experienced them in all the time I owned a restaurant.

Let me just explain what I think is getting very convoluted and complicated. I think, first of all, if I can ask you one question, Mr. Tavenner. When you say the "radio," do you mean when you use the radio as entertainment in your restaurant that you shouldn't have to pay because the broadcasters are paying for that?

Mr. TAVENNER. Incidental use of the radio.

Mr. BONO. What about the songs?

Mr. TAVENNER. Well, if it's incidental, I don't think that we should have to pay. We already have a system like you probably had in your restaurant, Muzak or something like that, that we're paying the rate on that system.

Mr. BONO. Well, then basically what you're saying is if you use the radio for entertainment, you shouldn't have to pay for the song?

Mr. TAVENNER. For incidental use.

Mr. BONO. Well, what about the song?

Mr. TAVENNER. Well, we're already paying them on the Muzak.

Mr. BONO. You're contradicting yourself. You're paying on Muzak, so you shouldn't have to pay them on the radio, is what you're saying?

Mr. TAVENNER. No, I'm saying how many times do we have to pay for them? When the live band plays in any restaurant, I pay for that, I pay on my CD machine, I pay on my karioke machine; how many times do I have to pay?

I understand there's a finite number of times that——

Mr. BONO. Let me see if I can clarify that. Let's say a song is like a painting, and somebody rents a painting right near you. They only use it at 6 o'clock at night, but they pay all day. So, it would be like saying, "Let me hang this in my place because you're paying for it, that way I don't have to pay the intellectual rights or royalties on that painting or the rent because it's here.

Or what about when you take a taxi cab from the airport and someone's going to the exact same destination and you share a cab with them. Both of you pay. It's the same ride. So, I don't understand the reasoning of when you say you don't have to pay for that entertainment, because the radio, the broadcasting company paid for that entertainment. But they didn't pay to give anyone the rights to pirate that. Now, we're saying right now that China can't pirate intellectual property or copyrights. We're up in arms because they seem to be pirating $2 billion worth. We have a contract with them, and they're not dealing with their contract.

Well, basically you're pirating the music from the radio, and you're justifying it by saying I paid for it over here. So, I just can't make that equation, even when I owned a restaurant.

Mr. TAVENNER. Well, I see what you're trying to get at if in my restaurant I'm playing the music four or five times——

Mr. BONO. I understand that. You're playing it a sixth time with the radio——

Mr. TAVENNER. I'm trying to feed into your example. If I was to pay for each time that I played it, that would be one thing. But that's not exactly the way we're charged, and you know that. We're charged on the square footage of our establishments and/or how much we paid for a blanket license every year on cost of entertainment, on cost of CD's or cost of TV's, each one of those categorically.

Then they go and say when you play ASCAP songs 489 times in your restaurant and we're going to charge you for that. If, in fact, we use your example of your painting, it's one entity and if we paid that 489 times they wanted to charge us at, that would sure be a lot fairer. But to say to us, you have to pay for—we don't have any arbitration right to come and negotiate that with you, and that's a disadvantage to——

Mr. BONO. I can't understand how—now let's get this straight. The radio paid the songwriters to broadcast that music. Now they didn't pay for anyone to take that music and use it commercially, that has never—the contract between the two. So, if you played that music then we are going to have to go to the broadcasters and say, "Well, your going to have to up the price to level that."

Mr. TAVENNER. You and I right now are arbitrating—we're negotiating, and if we had to have access, that would by OK with me. If I could go to my local ASCAP guy and explain to him how I run my specific restaurant, which is an individual case I'll grant you, then at least I have a shot at this.

Mr. BONO. Now, ASCAP and BMI, I've been sitting with this for a year, have come to you and said, "All right. Forget the radio at a certain point." And 7,500—so they had, virtually, bent over backwards to say, "OK." So you do—let's come to something.

Now you guys are saying uh-uh, and I don't like the notion that we are saying you can pirate music off the radio, but you can't pirate their—where's the logic in that?

Mr. ZELIFF. Let me jump in——

Mr. TAVENNER. I just want to say real quick, we're not saying uh-huh to them. We're saying we haven't gone far enough.

Mr. BONO. I——

Mr. TAVENNER. We have to have arbitration——

Mr. ZELIFF. I think this is a good healthy discussion, but we're going to have to end it. We're running out of time.

Mr. BONO. OK.

Mr. ZELIFF. I'll just make one comment. You're missing a great opportunity to get everybody that's riding to work that has a radio, people in their homes that have a radio or TV.

Mr. BONO. That doesn't have anything to do with what we're talking about here.

Mr. LAFALCE. Mr. Tavenner, are you related to Mary Tavenner?

Mr. TAVENNER. No, I'm not.

Mr. LAFALCE. Mr. Berenson, I was impressed with your agreement, that I guess you and ASCAP have ventured into with the National License Beverage Association. Now, as I understand it, you exempt any establishment, eating or drinking, with less than 3,500 gross leasable square feet; is that correct?

Mr. BERENSON. Yes, sir.

Mr. LAFALCE. Mr. Tavenner, what percentage of the restaurants belonging to the National Restaurant Association would be exempt from that agreement, if you would agree to go along with it?

Mr. TAVENNER. The numbers that Mr. Berenson's group uses don't exactly match the ones that we have.

Mr. LAFALCE. Well, I want your numbers, that's why I'm asking.

Mr. TAVENNER. I have them right here for you.

Mr. LAFALCE. If you have 3,500 square feet, what percentage of your restaurants would be exempt?

Mr. TAVENNER. Approximately one-third would be affected positively——

Mr. LAFALCE. Let me just ask this, rather than give a quantitative would be affected positively, how many of your restaurants belonging to the National Restaurant Association have 3,500 square feet or less?

Mr. TAVENNER. Well, we keep data up to 2,500 square feet, so our numbers show that approximately one-third of those restaurants would be affected positively.

Mr. LAFALCE. Well, one-third of the 2,500; is that correct?

Mr. TAVENNER. No, that's not correct.

Mr. LAFALCE. Surely.

Mr. TAVENNER. Well, for the record, approximately a third of restaurants would be affected by the 3,500 square feet or less, an agreement that was agreed to by NLBA.

Mr. LAFALCE. Do you or do you not keep data with respect to square footage above 2,500?

Mr. TAVENNER. Yes, we do.

Mr. LAFALCE. Mr. Tavenner, why did you make a statement that you only keep it with respect to 2,500 or less?

Mr. TAVENNER. 3,500. I just misread my—I apologize.

Mr. LAFALCE. Very good. What about when you estimate about 70 percent of the eating and drinking establishments would be exempt under that proposal alone?

Mr. TAVENNER. Because in their study, they didn't ask 74 percent of the restaurants what their square footage was.

Mr. LAFALCE. They did a random sampling of only a quarter of the restaurants; is that what you're saying?

Mr. TAVENNER. That's the numbers we got——

Mr. LAFALCE. I'm talking about—simply 25 percent to make an estimate, it's better than most polls.

Now, let's go on further. An establishment using six or fewer speakers with no more than four speakers in one room would also be exempt, so that's a—are you listening to me, or to your counsel?

Mr. TAVENNER. Yes, I am, sir. I'm sorry.

Mr. LAFALCE. Well, that's one more criteria. Now, on top of that, independently of that, if you have fewer than six speakers with no more than four speakers in a room, you're also exempt. Now——

Mr. TAVENNER. If you think that's nice and generous——

Mr. LAFALCE. Well, I think so, but maybe I'm wrong.

Mr. TAVENNER. I think that's a nice start, but we're asking for more.

Mr. LAFALCE. I think you hit the nail exactly on the head. It's a very generous exemption, but you still want more.

Mr. TAVENNER. We want——

Mr. LAFALCE. Let me try to quantify this now. The restaurants I go to, I don't know how many of them use more than six speakers. Do you have any data on what percentage of your restaurants use more—do you want to take a guess Mr. Tavenner?

Mr. TAVENNER. I couldn't—because I don't work for the National Restaurant Association. I work for Silo Inn, Incorporated.

Mr. LAFALCE. Well, all right.

Mr. TAVENNER. I would be stabbing at the dark, but we would be glad to submit to you any questions you have on those——

Mr. LAFALCE. Well, I think it would be interesting, because if we—CRS is collecting—and if we're also going to—regardless of size, establishments of six or fewer speakers, with no more than four speakers in one room, it seems you're going to have more than 70, whether it's 71 or 95.

Mr. TAVENNER. I understand the question——

Mr. LAFALCE. What about exempting any commercial establishment that's using three or fewer televisions of 55 inch screen size or smaller with no more than two TV's in one room, it would also be exempt.

Mr. TAVENNER. Yes, sir.

Mr. LAFALCE. So, that's going to increase the percentage that's already exempt. We have restaurants, according to CRS, and drinking establishments—somewhere in between the range of 70 to 100 percent would be exempt.

Mr. Berenson and Mr. Alger, if you assumed all three of those concessions that you agreed to, what percentage of eating and drinking establishments would be, in fact, exempt?

Mr. BERENSON. I don't have any such number, Congressman. As you said, it would certainly be greater than 70 percent, and somewhere less——

Mr. LAFALCE. So, you're really talking about the bigger restaurants or drinking establishments, then it would be within this embrace. Those that would have more than six speakers, those that would have more than three TV screens larger than 55 inches, and those with more than 3,500 gross leasable square feet; is that correct?

Mr. BERENSON. That is correct, sir. What we are trying to do is accommodate the needs of the small businessman's complaints, not the large businessman. We're taking the property of the songwriter and giving it to a small businessman. Under these conditions, you can use it without payments.

Mr. LAFALCE. Complaint is a very important one too. As I understand, you've agreed to have determinations of fact reasonably reached throughout the country; is that correct?

Mr. BERENSON. Yes, sir. BMI, ASCAP, and SESAC have agreed that with the negotiations with the National Licensed Beverage Association and the National Restaurant Association, that we would agree to regional arbitration as to facts. Not to settle a fee rate, but in a determination as to where a restaurant would fall into, if there's a dispute amongst the facts, and if those facts would include also——

Mr. LAFALCE. Subject to this regional arbitration, how often a song is or isn't being played, how often the music is or isn't being played, et cetera.

Is that a factual determination?

Mr. BERENSON. The factual determination as to not necessarily which songs are being played, but how often they're being played, if the license fee is based upon the number of nights that the establishment—that would be a fact. So, yes.

Mr. LAFALCE. Now, with respect to regional arbitration that you've agreed to, how many regions have you agreed to, is this being worked out?

Mr. BERENSON. We were talking for a compromise, Congressman, probably about six or more.

Mr. LAFALCE. All right.

Chair MEYERS. Thank you, Mr. LaFalce. Mr. Zeliff.

Mr. ZELIFF. Thank you, Madam Chair——

Chair MEYERS. If I could take just a second. The reason I am leaving and coming back is because I have a markup in another Committee. I apologize for all the disruption, but I find this extremely interesting. Mr. Zeliff.

Mr. ZELIFF. Thank you. Mr. Berenson, just a few questions. I want to make sure I understand you right. If we did this legislation and it was passed, you said that would threaten worldwide treaties, it would be against that; is that what you said?

Mr. BERENSON. No, I said that it could be construed as a violation of our commitments under Berne—the Berne Convention. We have had indications from the Irish Society that they would treat such as a violation and would retaliate through a doctrine which is referred to as "reciprocity."

A foreign government will say if you're not going to collect and pay us for these performances, we're not going to pay America.

Now, copyrighted music, intellectual property, is one of those few areas where there is a definite positive balance of money coming

into the United States. American music is used throughout the world and money flows into the United States——

Mr. ZELIFF. I appreciate that, and we'll certainly take that into consideration. When you look at the process of charging fees, how do you do it, what's your formula? If you can just quickly, I've just got a series of questions here, if we could just kind of quickly answer those just for the record.

Mr. BERENSON. Congressman, it really depends upon the particular universe you're referring to. Let me give you an example. The hotel, we were talking about hotels before, BMI, and I know ASCAP does, negotiates with the industry Committee, the hotel and motel association.

Negotiations are set, then they go on and ultimately—a reasonable license fee is agreed to between the performing rights organization and the industry association. Then that fee is—basically offered to members of their constituency, the hotel industry.

With respect to the restaurateurs, we have—I know BMI and I know ASCAP also has attempted to sit down with the National Restaurant Association and negotiate a license fee structure for the restaurant industry. We have been met with, "No, we cannot, we don't have that authority, or we don't want to."

Mr. ZELIFF. I understand there are obviously strong feelings on both sides, but did they not attempt to negotiate—I don't want to referee that battle. On the local universe how much revenue does ASCAP collect? How much does BMI collect? What is the total revenue you're taking in, and what's the bigger picture here?

Mr. BERENSON. I cannot speak for ASCAP, obviously, Congressman. With respect to BMI, considering revenues generated from all sources within the United States, and as I mentioned, American music is very popular outside of the United States, so we have a substantial amount of revenue coming from overseas, we're talking in the neighborhood of $325 million.

Mr. ZELIFF. So, that's a fair amount of change. What would you estimate ASCAP, are they bigger or smaller?

Mr. BERENSON. I believe they've taken——

Mr. ALGER. Over $40 million.

Mr. ZELIFF. More than $40 million. Again, I don't want you to misunderstand where I'm coming from. How do we legitimately pay for legitimate costs to folks who legitimately deserve payment, and not necessarily five times but in a fair process, how do you compensate your representatives? How are they trained? I mean, are they lawyers, are they salesmen, are they independent contractors, do they get paid by commission?

Mr. BERENSON. I'm sorry, sir. I didn't have——

Mr. ZELIFF. The people who you send out from BMI to call on individual businesses.

Mr. BERENSON. What we have, with respect to BMI, and I cannot speak for ASCAP in this case, we have been attempting to license—obtain licenses via telemarketing, because obviously the cost of sending someone out is very expensive. They are not lawyers, they're people.

Mr. ZELIFF. What——

Mr. BERENSON. When we have a situation where a restaurateur or a hotel, a music user, for some reason wants to meet with some-

one, we will send out a representative to meet with them. Those people are on salary, and there are incentives given by BMI based upon production, obviously.

Mr. ZELIFF. Let me just ask you two quick questions here. Do you think it's fair for one court to have jurisdiction, and is it fair to have people have to go to New York City? Do you think that's fair in terms of listening to disputes over licensing fee rates, and isn't there some fairer way?

Mr. BERENSON. In my estimation, Congressman, it is a very fair way, and let me explain why. Both ASCAP and BMI are under constraints by the consent decree to treat similar music users the same. With having a court, a judge, hearing this, it will be basically consistent, making sure that everything is in proper perspective.

When you have arbitrations you will have different, basically, different answers and different results throughout the country, which might very well cause a performing rights organizations to be in violation of it's consent decree by not treating someone similarly situated—users the same.

As an example, if restaurateur A on Main Street, arbitrated with BMI, and the arbitrator said you know the perfect fee for that is—let's say a $150 a year, it doesn't make a difference. Restaurant B which is right across the street and down the street on the same Main Street said you know I'm going to arbitrate with BMI and you have a different arbitrator and he might say—he or she might say, Oh, yeah, I think the fee should be $250 a year.

Restauranteur A is not going to be happy—restaurant A will be very happy, restaurateur B will not be too happy that he's paying more than the guy across the street.

When you have one court administering these issues, you will have continuity, everyone is treated the same. So, you will be paying the same license fee rate, and I think the main thing, on a vast history of rate court proceedings in most instances, and I am speaking for BMI now, we haven't gone through—one rate court proceeding. Our rate court just came in about 2 years ago. We want to negotiate, and we have been successful in negotiations.

There has been the claim of cost et cetera, yeah, if you have arbitrations, notwithstanding the fact that the gentleman to my left here is not a lawyer and he doesn't want to retain counsel, you're going to have an opportunity to be represented and it's going to cost money.

Mr. ZELIFF. Well, let me just finish up and just make a kind of a statement. From a small business—it's easy for all of you to say, "OK, we'll just go get a lawyer." You're trying to keep up with all the other pressures of the business and you're trying to make ends meet, you're trying to wade through all kinds of different Government regulations, I mean you got to really be there to see it happen.

Those that haven't been there it's easy to say it's only a $1.10 a day, $1.58 a day. What I'm trying to do is I'm trying to come up with some way that small business people can understand. Do you need a lawyer, do you have to go to New York to settle a dispute, if you can't afford to go to New York——

Mr. ALGER. Congressman, the Fourth Circuit Court in a 1994 decision stated that, "such a system of arbitration would subject ASCAP members to the staggering cost of participating in fee determination proceedings throughout the country." There's a portion to Section IV(c) of the AFJ which prevents ASCAP from, "entering into, recognizing, enforcing, or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licenses similarly situated." So, there's some basis for the reason that one court is the center for solving those cases.

Mr. ZELIFF. Very well. All you have is your talent and your brain, well, that's all we have too. Very much similar kinds of operations. I accept your point, and I'd like to move on to a guy from Missouri who has a lot of country western music in his State.

Mr. SKELTON. We do that. First let me say to Pat Alger, I can't help but admire those of you who do have talent and share it with us, and I have great feelings for what you and your colleagues do.

Maybe this is just the country lawyer in me coming out, I have to listen to all the witnesses, I just wonder whether or not whether everyone is assuming that all song's been written since 1914, since ASCAP was formed, for instance, what if Stuart Epperson's religious station says we're not going to do anything but play the old golden oldies—might forces is our God, 1909 or 1911 the Old Rugged Cross was written. Is ASCAP going to come and say hey what about us? And he says, no. My song's been written since 1914. What about the football games at those Dan Emmit song that many of us sing in the southern blood's in us like "Dixie" what about Steven Foster's songs? They don't come under all of this too. Where do we go from this? Where do we split in? I'm bothered with this being a country lawyer. Anybody?

Mr. BERENSON. Anyone whether it be Mr. Epperson's stations or a restaurateur, if they wanted to basically say, I'm just going to be playing public domain music, they don't need a license from BMI, they don't need a license from ASCAP, they don't need a license from SESAC. If I may just give an example, it will at the time—well—the answer's basically there's no need for a license. ASCAP would not ask for a license under those circumstances. However, at this particular juncture most people don't limit themselves to public domain music, Congressman.

Mr. SKELTON. How do you split it out? If I were to listen to Stuart Epperson's station there's some old songs, couple of which I did mention, how did you split that out, one or two or three new ones.

Epperson's repertoire which you would be responsible for, it's not available. Then the Congress shall hear all along we would like a user friendly repertoire, but that does not have a disclaimer so that we can look at the list of music that you are discussing so that we're not in a position of having to buy something, when we don't know what we're buying.

Mr. ZELIFF. You have a brilliant idea one morning, and you get up and you write yourself a song all day long, and it really is a dandy; and you immediately copyright it, and it is a dandy. Hey, "Garth, Garth, I got a dandy." He says, "Hum it to me," and you do. He says, "I'm going to go from here." Now, you sell this to a

publisher. What do you do after you assume you immediately copyright it?

Mr. ALGER. Not necessarily. When you are a professional songwriter, eventually after some success you become affiliated with a publisher so that normally any song you write would be turned over to the publisher. If we proceed to promote it, as you're saying, to Garth Brooks, we would indeed copyright it and we would first probably make a demonstration tape.

Mr. BONO. When you write a song, what you do first is get the song published. Either you publish it yourself or you publish—copublish it with a publishing company, and after you publish it in the process of publishing it is copyrighted and at that point when it starts getting played on the air BMI and ASCAP then know who the publisher and who owns the copyright.

So they collect—when Mr. Sensenbrenner pointed out how much money's being collected they are collecting for little songwriters. There are some songwriters that have four songs that give them an annuity for the rest of their lives. So, this is not two major corporations just collecting this multitude of millions of dollars and keeping it. They distribute it to every songwriter in America. So, when they publish it is then played on the air and we need somebody to keep a cohesive record for us of how it's played and then we get our performance royalties from those songs and that as I say can be annuities for many, many songwriters and many little guys it's not big guys.

Mr. SKELTON. Congressman—and Mr. Alger——

Mr. ALGER. Money follows the dollar, so to speak. If I have a song put on country stations those songs are identified. Eventually, dribbles and drabs add up to dollars and every quarter I get a check. This is essentially the way we're paid.

Chair MEYERS. Mr. Berenson, would you like to respond to that?

Mr. BERENSON. Just they're numbers. We're talking about discussing the money coming in; right? BMI represents 120,000 different songwriters and composers. Approximately 60,000 music publishers. We have 180,000 different affiliates, and BMI's operating as a nonprofit organization. We don't keep any money. All the money, as in the case of ASCAP goes to the creators of the music.

Chair MEYERS. Are you unwilling to publish a list of the music and of the composers that you represent?

Mr. BERENSON. Madam Chair, we do. As was said, when we opened. BMI offers for sale at $25, our cost, a CD Rom, which is updated I believe once a year or every 6 months, I'm not exactly sure. We offer an 800 number for people to call and ask us whether specific music compositions are in our repertoire. The restaurateurs were saying that this was something that they had to have. BMI kept track of the number of calls we received from restaurateurs calling to find out what was in the BMI repertoire. Less than 10 have ever come in from restaurateurs. We offer on the Internet our repertoire to anybody who has access to a computer, at no cost, can dial it up and see what is in our repertoire.

Chair MEYERS. I think I'd like to pursue that on my own time a little later, but I would like to refer to Ms. Kelly, who is our next questioner.

Ms. KELLY. Thank you, Madam Chair.

Chair MEYERS. Could we have that repertoire for our records, please?

Mr. ALGER. I have a copy of my repertoire which was run off of ASCAP's system yesterday. If you would like to see a copy.

Mr. EPPERSON. Are we speaking of repertoires without disclaimers?

Chair MEYERS. I don't know what the disclaimer says.

Mr. EPPERSON. That in effect, this repertoire is something that we cannot stand by in terms of figuring fees to radio stations and restaurants.

Mr. BERENSON. BMI has a disclaimer. It's accurate as of the time it was prepared. I can't say that it's an accurate item after its prepared. It just doesn't work that way. The reason compositions take a while to be put on the system is, as Congressman Bono said, first the music is created, it is then published, and then it has to be put in BMI's repertoire. We have to receive notification of it to put it on our system.

Chair MEYERS. We have had a request for this for the record, and I presume that you will profide it if that's the most accurate.

Mr. LAFALCE. May I ask also that you simply advise the Committee of how to access this.

Mr. ALGER. Printout also, Madam Chair, of our current listings.

Chair MEYERS. Thank you very much. Ms. Kelly.

Ms. KELLY. Thank you, Madam Chair. I want to thank all of the witnesses here who highlighted a lot of different points. I have basically three questions that I'd like fast answers too because my time is also limited here.

I want to pick up on something that our—that the Chair has brought up. I'd like to ask Mr. Berenson how you determine what songwriters get, what amount of fees?

Mr. BERENSON. I speak for BMI here. This information is put into a computer and statistically it—an independent agency comes to BMI—economists, and checked our sample and it was found to be 99.9 percent accurate. So using this survey as basis, we pay our affiliates for radio performances. Concert music as an example, when I say "concert music" I'm referring to—let's assume classical music——

Ms. KELLY. I don't mean to cut you off, but I have very limited time and I want to go to the other part of that. What amount—how do you determine the amount of the fee?

Mr. BERENSON. BMI publishes a payment schedule. Which says you'll get paid—any affiliate will get paid so many, so many cents per performance. So, many dollars a performance. We have a published schedule that is available to anyone. If you would like I would be more than happy to supply you with a copy of it.

Ms. KELLY. I think that's something the Committee would like to see.

Mr. ALGER. ASCAP has its own system.

Ms. KELLY. If ASCAP has its own system, I think it would be helpful to us to have a chance to see that also.

Ms. KELLY.I also want to know what percentage of the money that ASCAP and BMI collect for the licensing fee goes into the administration cost of the operation and the percentage of the money

that actually goes to the songwriter. He started to answer that and didn't really finish, and I'd like to hear——

Mr. ALGER. For ASCAP, it was around 18 percent for the previous year.

Ms. KELLY. That's 18 percent that you use for administrative costs?

Mr. ALGER. Yes, to run the operation of ASCAP.

Ms. KELLY. All the rest of that goes to the songwriter?

Mr. ALGER. And publishers.

Mr. BERENSON. With respect to BMI in any given year it ranges between 15 and 19 point something percent.

Ms. KELLY. One final comment. It seems to me that—I ought to tell you I'm a former small business owner, and I have a son who's a songwriter. So, I'm looking at this from both sides of the fence. But I'm wondering if there is a way of reaching some kind of settlement here that doesn't involve legislation. I'm wondering if you wouldn't like to address that.

Mr. ALGER. I would hope so. I would think that the market——

Mr. BONO. Will the gentlelady yield?

Chair MEYERS. Let's let Mr. Alger and Mr. Berenson respond.

Mr. BONO. Would you be satisfied if I responded to that question?

Mr. ALGER. I would like to just enter this into the record, if you would. This is a letter from the National Restaurant Association to ASCAP on January 11, 1995, addressed to John A. LoFrumento, Chief Operating Officer. It says, "Dear Mr. LoFrumento: This will reply to your letter of January 19, 1995, received by Fax on the same date. This organization does not wish to negotiate with ASCAP on any basis. Yours truly, William P. Fisher, Executive Vice President.

Mr. ZELIFF. Madam Chair, let me just make a response to that.

Chair MEYERS. Yes. But it's Ms. Kelly's time.

Mr. ZELIFF. The thing I was going to mention is that I think that was taken out of context after a long period of negotiation.

Ms. KELLY. Mr. Berenson, do you want to get involved in this?

Mr. BERENSON. BMI certainly has been involved and we have been attempting to resolve this, as I indicated in my testimony. We have resolved a major portion, 70 percent of establishments will be exempt from paying license fees from radio transmissions received in restaurants. That is, in my mind, more than a compromise, that's almost going overboard. When you increase the exemption by 300 percent, that is a major give.

Ms. KELLY. But you're looking at a legislative—not negotiated——

Mr. BERENSON. No, excuse me. This was negotiated at the insistence of the National Restaurant Association. They made it very—they want to legislate. We said it is a business dispute. We would like to sit down and resolve it amongst ourselves. That's what it is. I hate to say it, but comes down to one thing, money. That's what it comes down to. They don't want to pay as much. We feel that the writer should be compensated and this is not a situation—with all due respect—where Congress should be involved in a small business dispute. It's between the parties to resolve.

Ms. KELLY. I have——

Chair MEYERS. I think maybe we should be involved in it. This has been a long ongoing thing. The compromise was not negotiated until the bill had about a hundred cosponsors. So, I think we have been a real catalyst in this. Mr. Epperson.

Mr. EPPERSON. Thank you for your efforts. You were talking about the administrative cost of the music licensing organizations. It's interesting, the legal cost involving in ASCAP's case over 500 lawsuits currently pending, and something like $23 million in legal fees last year, if I'm correct. Some of us getting sued out there—awful lot of time it is a small business people. The fact remains even if we have this repertoire with the disclaimer, the fact remains if we rely on that repertoire at a restaurant or a radio station and we go over the line, we're going to be sued. That's the bottom line. We're still—even though the repertoire's there, we're going to be dragged into court. Congressman Zeliff referred to the rate court. Well, we just had a case come out of the rate court. It lasted 10 years, it cost $15 million involving Buffalo Broadcasting. They won the per program license that we are seeking here today as religious and classical music and talk radio broadcasters, they won that. Early in that case it was claimed if I understand correctly that case was similar to radio broadcasting but since they've won, we find out it's not at all similar. It has to go through that court again, and somebody has to come up with $15 million in 10 years.

So the rate court obviously is not working. Who at this table in the restaurant business or broadcasting can go to New York City and spend $10 or $15 million in 10 years?

Ms. KELLY. Madam Chair, may I ask a residual question? I cutoff my fellow freshman Congressman from California, Mr. Bono. May I ask that he be allowed to speak?

Chair MEYERS. Yes.

Mr. BONO. Thank you very much. I just wanted to say that—how long has been, 2 years from now since we've been working on this—I'm sorry, 2 years we've been working on this.

Both parties came to me because I had a background of restaurants and songs, and I, like you, just want to go with whatever is equitable. The hard thing to imagine is that copyrights are tangible, like this chair. Though you can't see them and you can't feel them, they have to be treated as hard property. So, that creates all this confusion here. But anyway what we attempted to do was say, "Look, let's not legislate this." And when both parties came to me the restaurant industry said, "We want to solve this problem where at a football game if a song gets played during halftime, we don't have to pay." I said, "Fair enough," and operated on that basis. Then it evolved into, "We don't want to pay period." So I encouraged and oversaw with Carlos, who is the Chairman of the subcommittee which deals with copyright, a negotiation that I thought BMI and ASCAP made a very honest attempt to negotiate. At a certain point it didn't reach the expectations of the restaurateurs. So, they declined to negotiate anymore and I was disillusioned to see that happen. I would have preferred that they settle their matter, not us.

Mr. ZELIFF. Madam Chair.

Chair MEYERS. Yes. If you can conclude your remark——

Mr. BONO. That's——

Chair MEYERS. All right. Thank you, Mr. Bono. Mr. Hilleary.

Mr. HILLEARY. Thank you, Madam Chair. I just want to ask Mr. Barba a couple questions. You may have mentioned this in your testimony, and I might have missed it, but what do you pay for your license fee?

Mr. BARBA. For ASCAP and BMI, it's just short of $11,000 per year.

Mr. HILL. Per year?

Mr. BARBA. Per year.

Mr. HILLEARY. Just out of curiosity—and I'm just trying to get a handle on this because I'm having trouble differentiating on it. I had one of my staffers go call your—the Balsams a while ago and just ask what a rate was, and you can correct me, I'm just going to repeat what they said. You correct it if it's incorrect.

Single is $189. per person, per night; this was Memorial Day weekend coming up. A double occupancy is $295. So, double occupancy went up from a $189. to $295 per couple, per night.

That cost includes three meals per day, per person. Whether they're eating or not I take it.

Mr. BARBA. There's no other place in Dixville Notch.

Mr. HILLEARY. Then there's a 15 percent gratuity fee added onto that, as I understand it. The gratuity fee's not only on the meals part, but on the room part.

So anyway, it's basically another $100, $106 per night when you add another person and, of course, you got costs for those extra three meals, if they're eaten. But that's not $106. So, there's an additional cost is the point to that extra person when you come into that room for the double occupancy. If you got 212 rooms at your place there, you just consider a hundred—and I'm sure they're not all occupied at the same time—anyway you consider all that, and that's if you did occupy it all day long, you just go take the $100. extra per person in the room, it's right around $21,000 in extra per day, and you multiply that times 365—anyway the point is that that's millions of dollars extra. Of course, you don't get full occupancy, but if it's half occupancy or a third occupancy, it's a couple million dollars extra per year.

How do you distinguish it, that's my question, how do you distinguish that variable occupancy from paying a couple times whether you listen to the music or not?

Mr. BARBA. My argument is not with the amount as much as it is with the philosophy that we are debating here today. As a Yankee, I believe in there being some equitable treatment for services that I purchase. I do believe that if this were a marketplace, a fair marketplace, an open market place, the rates could be whatever they were, and I would pay them. But this is not a free marketplace. I have no options and I'm arguing over the philosophy of paying for something that is truly incidental.

Mr. ALGER. I believe that the Balsam operations uses over $200,000 worth of live music last year as well, and some of these fees are based on that. It's not just based on background music.

Mr. BERENSON. Absolutely.

Mr. HILLEARY. Let me just——

Mr. ALGER. Peanuts to me, by the way.

Mr. HILLEARY. OK.

Mr. BERENSON. They keep saying there are no options. I think Congressman Skelton said, "What happens if you just want to play public domain?" That's an option. Another option is, although they may not like it is, they're free to negotiate with any copyright owner, whether it be a music publisher or a songwriter directly, but the user wants the ease of a license agreement, a blanket license agreement which gives them access to a complete repertoire. Then they complain that they have to buy the whole package. Well, you do have options. They could play public domain music, they could license directly.

BMI, ASCAP, and SESAC offer a package, basically, here's access to our repertoire and you can use as much of it or as little of it as you want. You don't like it—if you don't like that type of a package and you just want to pay for what you're using, you're free to negotiate individually.

Mr. HILLEARY. Now, I'm just having trouble figuring out why we distinguish—I mean, if there's a noncompetition thing, I think that's another issue. If there's and antitrust thing, that's another issue, but it's hard for me in my mind to distinguish the additional—we should not legislate you charging double occupancy. That market should be whatever the market can be. It seems to me in those aspects, I think would also apply to this other——

Mr. BARBA. There was no offer on Congressman Bono's part to have the cab driver pay for the incidental music on his radio when he was taking a fare somewhere, but the point is that in the cab the music was as incidental to where that guy was going as is the music on the TV station when our guests are watching a golf program in the afternoon at the golf club house that's why I'm here. I truly do believe that the copyright laws are very important and that people ought to be paid for their work. I am not upset at all about the motives of these organizations. I think they are very honorable motives, and I support those. My argument is with the method by which it's raised, the equity of that method, and the universal approach that's taken. I believe that our industry is taken on as sitting ducks by these organizations, but they don't treat us in normal business fashion. They come in with more threats than with help. We have no means to negotiate, and the courts are in New York, or the court is in New York. It is not a question from my point of view of the exact amount of money that I am paying for this. I don't believe that's appropriate that I should pay at all for TV and radio broadcast when they are incidental to my business. I am happy to concede that the songwriters and the composers and publishers ought to be paid for that but not by the incidental place where the music is played just like the taxi cab driver. It would be silly for them to be chasing cab drivers around the country trying to make them pay fees for incidental music in their cabs.

Mr. ALGER. I believe the cab driver argument is ridiculous. They would be exempt by any, the home style exemption that has existed for many years. The home style exemption is there for just that reason, any place that has a normal stereo or television in its operation can play it for nothing already. They're not the ones that are being licensed. We're talking about businesses that take advantage

of the fact that music is coming over the radio and television and use that to enhance their operation. This is a completely different issue.

Mr. BERENSON. If someone wanted to use radio while some establishments use CD's for music, they're saying they shouldn't pay for radio. Well, if you put on the radio to a music station, as an example, you're just substituting the radio for CD's, and why should that be exempt? I mean, the proposed legislation says you would have to pay for CD's. It's just a different use of that music. The entrepreneur, the restaurateur, is using it for a commercial benefit.

Chair MEYERS. The radio has paid for a couple of depending on——

Mr. BERENSON. They have paid for it for their use. If someone is going to take this product in a commercial setting to enhance their business ambiance, in many instances it is a retransmission under the law. It's another use of that music. Now, people say well, it's background music, it's incidental. Well, there have been studies to show that this background music basically serves the needs of the proprietor. As an example, in a restaurant, I mean, if you play faster music, a faster beat, people will tend to eat faster. If you put on slow music, people will tend to be relaxed and will tend to stay there longer. If you use background music in a supermarket, studies have shown, people will tend to purchase more than if you don't have background music. You may not remember what you heard, but it's serving its purpose even though it's "incidental." The music in supermarkets is certainly incidental. The supermarket is not in the music business. But music has been used for their benefit to enhance their business and its ambiance. Go ahead Madam Chair.

Chair MEYERS. Thank you very much. Mr. Bartlett—and then Mr. Wamp, and then we will return to see if Mr. LaFalce has closing questions, or I will take a turn in there somewhere.

Mr. BARTLETT. Thank you very much. I imagine all of you knew before you came here today that the horror stories are religion out there and that this is a very appropriate hearing here today. I am pleased to learn that there has been an agreement that small establishments are going to be exempt and establishments with less than six speakers, and no more than six, and with no more than four in one room will be exempt, and it is in dispute what percent of the restaurant business we exempt, but some percent will be exempt. I think beyond that and I've had our people come to us over several years now concerned about this, beyond that what we need is a fairness. Restaurant people and others who use music want to know what they're paying for before they're given a bill for it. That just seems to me to be imminently fair. I don't understand why you can't give them a repertoire without a discrepancy. The fact that a new song comes on the market the writer of that new song needs to understand that he can't get paid for it until the people who you are charging know that that's a new song that he needs to get paid for. You have the obligation, I would think, to provide your customers who are repeatedly using the music in restaurants and other establishments with a list. I don't care what you charge them. You can charge them a million dollars a year if you wish because this is a marketplace and if you charge them too much, they simply won't use it and soon the price of your product will reach

a market level where you're satisfied with the return and they're satisfied with the benefit they get from it, but I do not understand a system in which you use music, and you have no idea whether it is covered or not. You have no idea how much you are going to be charged. It just seems to me that up front the user has to know what music is in the public domain and what is not and what he's going to be charged is not in the public domain. Doesn't that seem fair to you and why can't you do that? And then I think the horror stories would end. Did you all agree that in the business of using the music, well, if we have this kind of a system that the horror stories would end, and I can't understand why the industry can't provide. There's no place else in our society where you get to buy a product and you are going to have to pay for it, but you have no idea how much it's going to cost you. Even in the medical profession, we don't have that situation.

Mr. ALGER. The repertoire is available. The reason it has a disclaimer on it is because of the nature of the creative process. I may be an ASCAP writer today. I may move my work to SESAC tomorrow. To update 7 or 8 million copyrights that are in the repertoire on a daily basis would be a staggering cost. It wouldn't cost a million dollars but it would be very hard to get a daily printout. The point of the disclaimer is to be in touch with the reality of how we do business.

Mr. BARTLETT. I'm still trying to——

Mr. ALGER. Here's a repertoire from yesterday from the services available on my works. I've checked it. It's accurate. It covers the works that are being performed on radio and television. It didn't cost anything to get this, it's available for free.

Mr. BERENSON. May I respond, congressman. There's a few different items which you raised. Number one, the cost of the license. Let me address that.

Mr. BARTLETT. I didn't raise that issue.

Mr. BERENSON. I thought you did. OK, the cost of the license.

Mr. BARTLETT. Yes.

Mr. BERENSON. What did it cost you for the person to use the music?

Mr. BARTLETT. Right.

Mr. BERENSON. With respect to BMI, ASCAP, and I believe SESAC, I know I can speak for BMI, and I'm quite familiar with ASCAP, every license agreement that is offered to a music user has a printed rate schedule and therefore what it will cost that establishment. It's not hidden. That establishment knows what it will cost. I mean, we have been doing this for years with respect to——

Chair MEYERS. Mr. Berenson, if you will excuse me and if the gentleman will yield, that's on the basis of how much the music is used in the seating capacity.

Mr. BERENSON. Each organization has a different formula. I mean I can't speak for ASCAP, but let me speak for myself and if I may ask you a question with respect to a retail establishment such as a clothing store, a space based upon square footage, with respect to a restaurant, a bar, the fee is for live music is based upon what the establishment spends on entertainment per year. With respect to recorded music that is broken down based upon the room occupancy, how many people can fit into a room. It's there.

I mean we can not deviate. We can not deviate or else we're going to violate our consent decree which says we have to treat similarly situated users the same. They have always been in BMI's agreements, these schedules have always been in BMI's contracts.

Mr. BARTLETT. Why do we have stories of a restaurant being in operation of your people coming in after the fact telling them that they owe this much money. There has been no contract and there has been no agreement of any fact and if they don't pay the money, their alternative is to go to court in New York. Many of our people they say it seems more like protection money that used to be paid to the Mafia then it does a fee for a legitimate service.

Mr. BERENSON. Well, I'm certainly not going to go into the Mafia because I'm not familiar with their business practices, but I will say this. I can not speak for horror stories about that. BMI, BMI's people go in, they do not try to coerce. Obviously, there is a distinct need for the establishment to take a license. Mr. Epperson was talking before about the vast number of lawsuits, the majority of these lawsuits, congressman, involve establishments that don't get a license. If you try to get a license and they refuse, you have no other recourse but to go to court to enforce your rights. We don't go around collecting. The license that BMI has with restaurants, bars, and hotels is a self assessing license. Let me explain what I mean. In order for us to determine the fee at the end of the year, the restaurateur or the hotel submits a report to BMI as to what they spend on entertainment. When that report comes in BMI either adjusts upward, downward, or it remains the same based upon prior year's activity. No one goes in and says you have to pay more money without having a contract. The person would be fired on the spot, if we knew about it.

Mr. BARTLETT. Mr. Tavenner——

Mr. BERENSON. Then I have one other comment. I know my time is up, Madam Chair, I have one other comment.

Mr. TAVENNER. I think part of the point that Mr. Berenson——

Mr. BERENSON. Thank you, sir.

Mr. TAVENNER. Mr. Berenson has failed to bring up, and we asked this earlier in our testimony, is that we want to see some type of situation where we can arbitrate. If we don't agree with what Mr. Berenson rates our room at or what Mr. Berenson says is the cost of entertainment, we have no recourse for that. Like you earlier talking about the access to repertoire, we think that's ultimately fair.

Mr. BARTLETT. That's the American way. Why can't we sit down with these people on a local level and say, "Mr. Berenson, we don't agree with what you're saying. We want to see your people in our office."

Mr. TAVENNER. Sometimes they may say, or sometimes it may go over. Right now I have one going on for 3½ months where I can't get an answer period.

Mr. BARTLETT. Mr. Tavenner, I'm glad to see you here at the table. You're from our State not our district, but glad to have you here at the table.

Let me just—for you all are representing the industry. Now it seems to me that what you're doing is the equivalent of you coming to me, Mr. Berenson, and saying I've got a number in my mind.

Tell me what that number is, and I say seven. You say, "Gee, no, it's not seven you owe me." Now you know not telling these people up front what they're going to have to pay for, they're not knowing the repertoire without a disclaimer. That is the equivalent of you coming in here and saying you have a number in mind if you can't guess that number then you owe me. That just fundamentally isn't the kind of fair way that business ought to be conducted in this country.

Chair MEYERS. Mr. Wamp.

Mr. WAMP. Thank you, Madam Chair. Now I know what my children must feel like and my wife and I are having an argument and they don't know why in the heck we can't resolve it, but we can't. My brother, much like Sue Kelly's situation is a musician, he's an architect, he's a small business person, he's a songwriter, and a lot of songwriters are small business people and seems like this is a family discussion. But I will say on all the fronts, my brother is overtaxed, overlitigated, and overregulated, whether he's a songwriter or small business person, we all share that.

I came out of real estate business and I've done a lot of work for Outback Steak House. Their prototype restaurants are about 4,500 square feet. The Red Lobsters are about 3,500 square feet. That's really the range of most of your national restaurateurs. My question for both the restaurant people, if 3,500 square feet is not acceptable, what is? If not, why not?

Mr. TAVENNER. Whatever would cover the majority of our members, obviously. It's not—he insists every time that we're going to pay less. That's not the problem here. We want to pay less volume. Do you understand what we're saying here? We have to pay for the song over, and over, and over again with devices and with different techniques, live music, CD players, et cetera, et cetera, and every time there's a new invention, they're going to come back and say now you got to pay for that one. Often times they're not playing at the same time. All right. So, there's not a dual use of the particular songs. So, we want to have a rating system that takes care of our members and the members of the coalition. It's not just the restaurant association. We have a broad range of members of the coalition here today asking you to look at the problems that the small retailers are having, et cetera.

Mr. WAMP. Mr. Barba, do you have an issue with that?

Mr. BARBA. Again, I would believe that the issue that we're debating today is included in this bill, it has to do with the incidental playing of radios and TV's and from my point of view it is untenable to be charging for that usage.

Mr. ALGER. That has been mentioned today. There's a small business exemption which covers truly small businesses. We've agreed to legislate access to the repertoire. We've offered to solve disputes regionally. We've agreed to a code of conduct. We don't need a legislative bill; we need "good-hearted negotiation" with the intent of solving the problem. This is what we need.

Mr. BERENSON. May I just state, it's been brought up over and over again. What can they do—why can't they have regional negotiations, why can't they do local negotiations?

Let me speak for BMI. When this issue started coming up even before H.R. 789 came on the plate, we attempted to start negotia-

tions with various State restaurant associations to negotiate licenses for their members in that State.

As an example, we spoke with the restaurant association in the State of New York. We said, "OK. Let's negotiate an appropriate license for all the restaurateurs in the State of New York." Things were moving along. Then H.R. 789 hit, and then we were told no more negotiations, we're not going to negotiate anymore.

So as I said in my statement, they want to legislate at this particular point. With respect to the horror stories that were mentioned before and I'm sorry I didn't get the opportunity to respond. what Pat just said is true. BMI and ASCAP agreed to a code of conduct for employees. We requested that the restaurateurs also agree to a code of conduct. There have been instances where our representatives have gone in and have been met with, let me say, "hostile reactions." OK. Again, it's a question of education. They want us to go in and ask us to educate the user of music. So, the basis for a resolution should be there, it is there.

Mr. WAMP. Associate myself on the comments that I don't think you all need to be here. You should be able to work this out among yourselves.

Chair MEYERS. Thank you, Mr. Wamp. I'd like to ask a question. I'd like to turn to Mr. LaFalce, and then Mr. Zeliff has some concluding questions on second round.

I don't have any really good idea of what we're talking about in terms of dollars. I mean can somebody give me a typical example of a typical restaurant. I want to know—I've heard someone said it cost a $1.50 a day or a $1.10 a day or something like that. Then later he said they came in and told him he owed and additional $900. I can't put all of this together and so Mr. Tavenner first and then Mr. Berenson, and then Mr. Barba or anybody who would like to comment.

Mr. TAVENNER. I'd say my restaurant is fairly typical. It's approximately 4,800 square feet, and we have a Muzak system, and we have live entertainment only on Friday and Saturday nights. My combined fee, between BMI and ASCAP is $2,400.

So I want to know why someone else is paying a $1.50 a day when I'm paying whatever that is, which is considerably more, anybody can calculate that out right here.

So where do I go? I can't go to an arbitrator; right? I can call and ask them to bring a sales rep into my area of—and that happened 3½ months ago and I still haven't seen them, after numerous phone calls, et cetera.

I don't know who's paying the $1.50 a person. If they all are paying a $1.50 maybe they're not telling the truth to the agencies about how big their place is, how many seats they have et cetera, et cetera. But I don't know anybody paying a $1.50 a day. In my Montgomery County Restaurant association, I know not one person that pays a $1.50 a day. So, that's my typical example for you. Thank you.

Chair MEYERS. Mr. Berenson.

Mr. BERENSON. The gentleman to my left here, I can speak for BMI, and as I said, we have the same printed form for restaurants et cetera. If in fact that you are using a background music service, such as Muzak, and you have no other recorded music; correct?

With BMI, there's no recorded music fee. You're aware of that, we've discussed this before. So, Mr. Tavenner would only pay for live music. Our fee schedule is based upon what the annual expenditures are of that establishment for entertainment.

So I would ask Mr. Tavenner what you spend on entertainment per year, or per week, you could do it either way?

Mr. TAVENNER. I spend approximately $1,000.

Mr. BERENSON. So, $1,000 a week, which is, obviously, 52 weeks, we realize that comes up to approximately between $50,000 and—figure any less than—dollar less than $65,000 a year. The annual live music fee for BMI under those circumstances is $690 per year. That gives you an idea. If you have a smaller establishment that spends less on entertainment, as an example, the live annual music fee, the smallest category that we have is we spend less than $5,000 a year.

You may have a piano bar in the restaurant, and the piano player comes in one time a week, three times a week, and probably will not be—the restaurateur will not be paying over $5,000 a year.

The annual license fee for BMI in this instance is $175 per year, and it goes up progressively to establishments that pay hundreds and hundreds of thousands of dollars per year, that is what it's based on. When——

Chair MEYERS. So, you're saying then that if Mr. Tavenner pays $600 a year for his live music, then the other 18,000 or whatever the figure was that he's paying annually is for the——

Mr. TAVENNER. I actually pay more than that to BMI, don't ask me exactly why, because—if I may excuse myself, I appreciate you using that rate.

I don't get that. I only get a front page, and I get one page to fill out every year for BMI, one page. I don't get this. This doesn't come to me in the mail, and if I call and ask questions about it, I can't get a field representative to come see me. I don't have my local recourse. We feel that this has to be legislated. As Congressman Wamp says he doesn't feel that's necessary. For 40 years we've been trying to get this done.

Chair MEYERS. Yes. It has been a long ongoing fight. I do not know—maybe there's no role for Congress in this, but if there isn't, I think that in another 50 years you will still be having problems here.

Mr. ALGER. Madam Chair, ASCAP's schedule is given to this restaurant. He does get a copy of this. I'll leave this with you. His fee from ASCAP would be $1,750 and it's based on a schedule that's very clear, and easy to understand. It's different than BMI's because ASCAP's repertoire is larger.

Chair MEYERS. Anything that you can give the Committee for the record that would help us gain an understanding of this would be appreciated, because I think the problem seems to be one of restaurant owners don't have a really good understanding of the schedule. They're not being communicated with very well, and the fact that there is just the one court does seem terribly burdensome. If you just have one court that you can go to, there ought to be a tremendous effort at communication so there would be some understanding along the way.

Did you have a comment, Mr. Barba?

Mr. BARBA. Well, the only comment that I would make is we do have a lot of entertainment at our property and in addition to the recorded music—excuse me, the music that comes in over the television, we're required to pay for not only the payments that we make to musicians and to performers, but also we're to pay ASCAP and BMI on the room and board that they receive while they are staying at our property. Also the commissions that are paid to their agent who booked them at the property, and any technicians that were required to put on the show would also be paid. If by chance I should hire an entertainer who costs twice as much to sing the same songs I would pay twice as much to ASCAP or BMI for the same use of songs. It is this philosophy of taking what I consider to be—not directly related expenses to figure out their rates and then assessing those rates indiscriminately to those who they can find to pay them.

That is to say that if we were talking about all publicly aired music in commercial establishments and the Balsams paid its per rate a share of that compared to all the time that's songs are played in commercial establishments across the country, I would have less of an argument, but I don't believe that's the case. I believe the case is that because we've been in business for 131 years, and because my partners and I have operated the hotel for 27 years, we're going to get nailed at a much higher rate than the harder——

Chair MEYERS. Excuse me for 1 second, Mr. Barba. I would like to say thank you to Mr. Rule who has told us in advance that he had to leave at 12:30. I have a question for you, Mr. Rule, and I will submit it by mail. Thank you very much for being with us today.

Mr. RULE. Thank you for having me.

Chair MEYERS. All right. Mr. LaFalce. I have some other questions, I'll submit them by mail.

Mr. LAFALCE. Mr. Barba and Mr. Tavenner, you both provide live music, and at least to that extent the proposed bill would not be applicable; is that correct? What percentage of your entertainment is live music as opposed to——

Mr. BARBA. A great majority.

Mr. LAFALCE. A great majority of yours is live music. So, in so far as you're personally speaking——

Mr. BARBA. Except that I am also a dedicated member of my State Lodging and Restaurant Association, and I was asked by them to come and testify today, and I represent their interest.

Mr. LAFALCE. Fine. Mr. Tavenner, I know that the National Federation of Independent Business conducts frequent polls of their members. I suspect the NRA, the National Restaurant Association, does also; is that correct?

Mr. TAVENNER. Yes, sir.

Mr. LAFALCE. I wonder if you'd be willing to conduct polls of your coalition to find out how many of your establishments do have less than 3,500 gross leasable square feet, how many of them do use six or fewer speakers with no more than four speakers in one room, and how many of them do use three or fewer televisions of 55 screen size or smaller et cetera. That might be interesting data so

that we can find out amongst your membership how many would, in fact be exempt.

Mr. Epperson, I'm not sure what your problem is. You talked about the repertoire, and initially I thought it was you couldn't get a copy of the repertoire, but then, obviously, your organization has access to the Internet, CD Rom's, 800 phone numbers, et cetera. It's also my understanding that agreements have been made—or offers have been made to supply you with printed copy lists for a price, which would be about $25 I'm told.

So I guess it's not your ability to access the repertoire, I guess it's the fact that there is so-called "disclaimer" on it. Is it correct that your problem is not with your ability to access it, but it's with the fact that there is a disclaimer?

Mr. EPPERSON. No. In reference to repertoire earlier was the fact that we've been talking with these licensing groups for 15 years or more. We've been led to believe that there never was a repertoire available. There's no such animal. Then 2 years ago it comes out in Congressional testimony that there's kind of been one there all along. That was what I was referring to.

Mr. LAFALCE. Just the fact that you can't access the repertoire or——

Mr. EPPERSON. No.

Mr. LAFALCE. The disclaimer?

Mr. EPPERSON. No, the disclaimer——

Mr. LAFALCE. All right. What is the disclaimer? People always talk about a disclaimer, but what are you disclaiming? I mean, somebody asked me a question yesterday, how's the election going to go in November. I said, "Well, if it were held today, this is my judgment on how it looks." Now, that was a disclaimer. I didn't think there was anything wrong with it. What's the disclaimer that bothers you?

Mr. EPPERSON. If I bought a BMW and they say——

Mr. LAFALCE. Let's talk about the disclaimer. What is the disclaimer on the repertoire that bothers you?

Mr. EPPERSON. The fact that if you rely on the repertoire, as I understand it, and violate the law by relying on the repertoire, then you will be sued——

Mr. LAFALCE. Well, now wait a minute. Wait a minute. Can you give me any instance when someone has relied upon the repertoire and has not been able to use that reliance in—as a—it's a fairly recent addition, isn't it Marvin?

I would certainly think that if you, in fact, did rely in good faith upon a repertoire and it was within a recent origin, you'd have a good faith——

Mr. EPPERSON. Will ASCAP and BMI make that commitment right now, if we rely on the repertoire, we will not be sued?

Mr. LAFALCE. To the restaurants and to the—if you're in compliance with it and if there's a reasonable period of time in which it had not elapsed, I would think so.

Mr. BERENSON. With respect to Mr. Epperson's statement, if your station has a license with BMI, now we're referring to a situation where your station is licensed; right? Certainly BMI could not sue them. Even if they were on a blanket license it wouldn't make a darn bit of difference, because they have access to everything.

If they're on a per program license, the only thing that can happen they would be charged for that particular performance. They can't get sued. They would have to pay for that performance.

Chair MEYERS. Is that a blanket religious license, or blanket license for anything in the world?

Mr. BERENSON. Basically two forms of licenses that performing rights organizations offer. A blanket license which gives access to the user everything in the repertoire, and they pay a set fee.

Then there's a per program license, which is a form of blanket license. They have access to the all of the repertoire; however, for feature use of music, and let me sum this up by saying, they have to pay—they will pay only when that feature music is performed. They don't pay for any other performances unless for future uses other than if there's an actual performance.

So, in the instance that Mr. Epperson was talking about, let's assume his station decides to perform feature music in a particular segment, and they look up in the case of BMI, and I will speak for BMI, they look up a song and it is not listed or perhaps it is listed and that songwriter went from BMI to ASCAP and we haven't been able to update it. Well, what happened is when he reported to BMI that particular song, what would happen is he would be charged. That's what will happen. No lawsuit, no threat of lawsuit. So, I don't know where this lawsuit——

Mr. EPPERSON. There are severe monetary penalties for mistakes in these reports on the music that you play or do not play, or if you make mistakes on these reports which you're required to file each month, the radio station if you use a per program license. That's one problem we have with it.

If the radio station decides they are going to play absolutely no music except that which is in the public domain, such as a classical music station, absolutely no music except public domain, Beethoven and Mozart, and they make a mistake, but they rely on the repertoire to guide them. Then what happens?

Mr. LAFALCE. I didn't get my question answered. What is the disclaimer—is the disclaimer simply that this repertoire is valid as of the date of publication? That's the disclaimer?

Mr. BERENSON. Yes.

Mr. LAFALCE. Is there more to the disclaimer that you're troubled about than that, Mr. Epperson?

Mr. EPPERSON. It renders the repertoire basically as a strict point useless.

Mr. LAFALCE. That's a separate issue. The question is: What is contained within the disclaimer that bothers you, other than the fact that they say this is valid as of the date of publication. I mean, I have a number of different lists, and they're valid as of the time that input was entered into the computer. They're not valid—I mean they're not correct a day or two later. My mailing list, for example, I always get some returns, because there are changes in the addresses, people move or die. So, they're not valid as of mailing. They are valid as of the date of entry of the information.

Mr. EPPERSON. The disclaimer says, and I quote my colleague, "you cannot rely on this list as a—to be sure you haven't infringed on copyright laws."

Mr. BERENSON. What else does it say? Does it say you have the ability to call an 800 number and check? Does it say that there are other ways to check a current status of the data listed? Of course it does. It's certainly available as I testified to before.

Mr. LAFALCE. Mr. Alger, you have a——

Mr. ALGER. Twenty seven of Mr. Epperson's stations are listed—are licensed on a per program basis. ASCAP sent him a software system to help him do his per program licensing in October, and never heard back from him. So, I think ASCAP is making an honest effort to cooperate in any way it can.

Mr. LAFALCE. One last question. There was concern that the rates were not available to the users. If the rates are part of the contract, aren't they of necessity given either to the individual restaurateurs, or at the very least, to the restaurant associations? Where's the lack of communication come in? It's got to be part of the contract, and if the contract's with the restaurant association, is it then the responsibility of the State restaurant association or what have you to advise its member organizations; or if it's a franchise operation and the contract is with the franchisor, would it not then be incumbent on the franchisor to advise the franchisee?

Chair MEYERS. Those who want to comment would comment quickly. Mr. Zeliff has a round two, and since Mr. LaFalce got one, Mr. Zeliff deserves one.

So let's start with Mr. Tavenner, and please answer quickly because we have a vote on.

Mr. TAVENNER. Congressman, the rates are known on the rating sheet that's correct, sometimes in the market place and we want the ability to arbitrate and negotiate——

Mr. LAFALCE. You said those rates were not available to you during the course of your——

Mr. TAVENNER. I said that I didn't receive this in my annual mailing, which I don't. That's a true statement. I don't receive——

Mr. LAFALCE. But if there's a change you would have to get it, would you not?

Mr. TAVENNER. That's correct.

Mr. LAFALCE. So——

Mr. TAVENNER. Or in the middle of the year if I had to make a change, that would be another example of what we're talking about.

Mr. LAFALCE. We don't have any changes, we're talking about the change in rates.

Mr. TAVENNER. Sir, if during the middle of the year I cut my music back, I want to adjust that rate, I should have that ability to do that in mid-year. I mean things change in the marketplace, that's all we're saying.

Mr. BERENSON. If Mr. Tavenner's music policy changed, when he submits his annual report there would be an adjustment. I mean, you cannot—I mean, obviously as a business person you can't say, well, I'm changing 1 month, changing it the next month, changing it the next month.

At the end of year there's basically a tabulation rate to adjust it.

Mr. TAVENNER. It doesn't happen that often, that's true, but we'd still like local arbitration to be a part of this.

Mr. LAFALCE. They've agreed to local arbitration of all facts.

Mr. TAVENNER. I haven't seen that in the bill——

Mr. LAFALCE. They're not in the bill, it's in the agreement.

Mr. TAVENNER. Right.

Chair MEYERS. Mr. Zeliff.

Mr. ZELIFF. Thank you. Let me ask you, Mr. Berenson, just two quick questions. Do all BMI and ASCAP members receive compensation at one time or another?

Mr. BERENSON. I would have to say, no. There are some—I can't speak for ASCAP, but I will speak for BMI, that some do not because their works are not performed.

Mr. ZELIFF. But there is a fair process, there is a system?

Mr. ALGER. At ASCAP. Whoever's music is used is compensated.

Mr. ZELIFF. Can a licensee—a restaurateur, pay one of the licensing societies or do they end up usually paying more than one?

Mr. BERENSON. If the restaurateur wanted to go to the trouble to restrict themselves as to the music from one particular society, they could do so.

Mr. ZELIFF. I think what I heard Mr. Barba, and I certainly associate my comments with his, as a small business in Jackson, New Hampshire, what he's saying and what I'm trying to say, what we're trying to come up with here is what is the fair process and how can we solve this? What we're trying to figure out is what, as restaurateurs and small business owners, we need to know. What are the fees going to be and what the policy will be. If there's a serious intent here for all sides to come together. Let me just ask you in the bill, H.R. 789, is it possible to negotiate? Under H.R. 789, what percentage of your total revenues will be lost as a result of H.R. 789 passing? In other words an incidental piece. How much revenue would you lose, is it a small amount?

Mr. BERENSON. Congressman, It would be a guess on my part. I mean——

Mr. ZELIFF. What would your guess be?

Mr. BERENSON. My guess would be this might have an impact in excess of 20 percent of the revenues——

Mr. ZELIFF. You think it would be 20 percent? In your proposal that you tried to work out that said—you said that 70 percent of the establishments would be exempt, what do you think your lost revenue would be there?

Mr. ALGER. It would be——

Mr. ZELIFF. It would be close to 20 percent?

Mr. ALGER. I think it would be sizable.

Mr. ZELIFF. More than 20 percent?

Mr. ALGER. You mean would we lose the 20 percent, with the compromise with the NLBA?

Mr. ZELIFF. I think what we're trying to say is if we eliminated all the incidental background music, you said that you'd lose about 20 percent revenue.

Mr. ALGER. Yes.

Mr. ZELIFF. I'm not going to hold you to be exact. But the second question would be is if it's 20 percent, how much would it be eliminating all incidental background music. On the proposal that you have you said getting all small properties out of the process 70 percent of the stations would be exempt, how much would that cost?

Mr. BERENSON. Again——

Mr. ZELIFF. Roughly.

Mr. BERENSON [continuing]. the worst mathematician there is in the world——

Mr. ZELIFF. More or less?

Mr. BERENSON [continuing]. would be less than the 20 percent. If it was 70 percent in theory, if all things were equal, each one played the same amount, it would be 70 percent of 20 percent.

Mr. ZELIFF. Why can't reasonable people—I mean, here's an opportunity for you to save some money by supporting this bill, H.R. 789, right, and two things I think would probably need to be done in order for you to be there. One would be to accept the process of giving up the incidental revenue. The second piece is a third-party arbitrator, because I think that's what we're hearing. Steve Barba over here says I'm willing to pay, that's not the problem. The process is the problem. We're hearing people—and you guys can say, I guess I can afford to go to New York and you can too. But there's a lot of people who can't. When the IRS comes in to audit your books how do you feel about it? You get intimidated.

Mr. BERENSON. It doesn't bother me as much as——

Mr. ZELIFF. I don't want to assume that it's a regular process with any of us, but, generally people get intimidated. I think people get intimidated when you come in with a contract and you start beating people over the head saying you're going to sue them. All of sudden there's only one place to go, there's New York, and then you say, well, I give up.

Mr. BERENSON. Congressman, that's not really what happens. When they say, we're going to sue you—this is interpreted because we have to advise them. There's a court decision requiring us to do so. If we don't tell the people, the restaurateurs or any users that they could be subject to a lawsuit, we have a major problem. So, if you go to a place and it's interpreted by that restaurateur, well, if I don't take their license they're going to sue me.

Mr. ZELIFF. Well here's the problem. For 40 years we've been fighting this out. For 40 years we've been saying, well, maybe we can come to the table. Now we're talking about a legislative solution.

Maybe it would be better to have a legislative solution if you feel that you cannot do it. I think there's a chance to come together here. Forgetting about the past, can you deal with getting what's in the bill, as far as incidental music, if you can deal with that and you can come up with third-party arbitration, maybe everybody can come away from the table as happy campers. I don't know.

Mr. BERENSON. Congressman, we've met them 70 percent of the way.

Mr. ZELIFF. I think you get a better deal if you go all the way.

Mr. BERENSON. Better even yet, if we pay them to play the music, I guess.

Mr. ZELIFF. You can do better than 20 percent.

Mr. BERENSON. I don't know. I don't want to be a wise guy, but I'm just trying to say that I hope that we come to a fair process here.

Chair MEYERS. Thank you. Because we have about 4 minutes left before the vote concludes, I would like to take the opportunity to thank all of the witnesses. You have certainly helped with my

knowledge and information about this entire area, and we appreciate it very much. Mr. Epperson.

Mr. EPPERSON. Mr. Berenson raised the question about—which I think I need to clarify just for the record. The church service on broadcast which is paid for by a sponsor, I think I can quite agree with him that that should be a fee paid on music like that. However, I disagree about the savings we get on the present per program license. Because on a per song basis, we're paying three to four times and as much as 10 times as much as—the all music stations pay for their music. So, that's grossly unfair. Thank you very much.

Chair MEYERS. I thank you very much. This hearing—I would like to keep the record open without objection for 10 days, and this hearing is concluded. Thank you.

[Whereupon, at 12:40 p.m., the hearing was adjourned, subject to the call of the Chair.]

# APPENDIX

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STATEMENT OF REP. JAN MEYERS (R-KS)
CHAIR
COMMITTEE ON SMALL BUSINESS

MAY 8, 1996

"Music Licensing and Small Business"

Today's hearing is our second in a series of hearings looking at intellectual property issues of importance to small business. The issues surrounding music licensing practices of the performing rights societies (ASCAP, BMI and SESAC) has long been a major concern for small businesses in the entertainment and retailing industries. The background music that we all hear when we are out at a favorite restaurant, a local bar or a retail store is something that many people don't really think that much about. Today's hearing will change all that, because how music is licensed, who pays for it, and how many times it is paid for is going to surprise many of us.

As many of you know, music licensing under the copyright laws and the antitrust consent decrees in effect with respect to ASCAP and BMI are issues that are within the legislative jurisdiction of the Committee on the Judiciary. However, the Committee on Small Business has a rich tradition of holding oversight hearings on issues of importance to small business. In fact, in 1957

(during the 85th Congress) a subcommittee of the Permanent Select Committee on Small Business of the U.S. House of Representatives held five days of investigative hearings on the practices of ASCAP. The record of those hearings covered over 700 printed pages; and, as a result of those hearings, Members of the Committee met in executive session with representatives of the Department of Justice, who took the matters presented at the subcommittee hearings under consideration in their continuing enforcement of the 1950 Consent Decree against ASCAP.

Today, this issue of music licensing remains critical to many small businesses. For example, 92% of NFIB's members have demanded music licensing reform legislation and are firmly behind H.R. 789, the Fairness in Musical Licensing Act. This legislation was introduced by my colleague and friend, Jim Sensenbrenner, and I am proud to be a cosponsor. I have asked Mr. Sensenbrenner to join us on the Committee today and take part in our proceedings.

Despite my own strong sentiments in favor of H.R. 789, today's panel of witnesses were carefully selected in an effort to present a balanced view of the competing interests in this area of music licensing.

Mr. Rule is a respected member of the antitrust bar and a partner with the Washington, DC law firm of Covington & Burling. He is a former Assistant Attorney General who was in charge of the Antitrust Division at the Department of Justice during the final years of President Reagan's second term.

Mr. Barba is a hotelier from New Hampshire, and, I believe, a constituent of Mr. Zeliff's.

Mr. Alger is a songwriter from Nashville and a member of ASCAP.

Mr. Epperson is Vice-Chairman of the National Religious Broadcasters and is here with us today from North Carolina.

Mr. Berenson is with us today on behalf of BMI where he is the Senior Vice President and General Counsel.

Mr. Tavenner is with us today from just up the road in Olney, Maryland. He runs a restaurant named the Silo Inn and is appearing today on behalf of the National Restaurant Association.

HOUSE COMMITTEE ON SMALL BUSINESS

FULL COMMITTEE HEARING ON MUSIC LICENSING AND SMALL BUSINESS

Opening Statement of Glenn Poshard

May 8, 1995

Madame Chairman, thank you for the opportunity to address the issue of music licensing and its affect on our nation's small businesses.

The introduction of H.R. 789, The Fairness in Musical Licensing Act of 1995, at the beginning of the 104th Congress has opened a flood gate of concerns from a number of my constituents on both sides of this issue. In my district, I have small business owners claiming unfair practices by licensing agencies, while songwriters have come to me concerning their critical need to be fairly and appropriately compensated for their time and talent.

It is also my understanding that all the parties involved in this debate have been involved in serious negations for the past year in an attempt to resolve this matter without major changes to the current copyright laws. I ask that we look closely at this agreement and evaluate its merits.

Madame Chairman, I also wish to welcome our distinguished panel of speakers whom I am sure will inform and enlighten the members of our Committee as to the concerns on both sides of this issue.

Statement of Representative William H. Zeliff, Jr.
before the Committee on Small Business

"Music Licensing and Small Business"
May 8, 1996

I would like to thank Chairwoman Meyers for holding this important hearing and would like to welcome Steve Barba of The Balsams from Dixville Notch, New Hampshire.

As a small business owner myself, with a country inn in Jackson, NH, I know firsthand the arbitrary nature of music licensing fees. I want to emphasize from the outset that I fully endorse the necessity for strong intellectual property rights protection in the music industry. Those who compose and perform musical works have every right to receive compensation for their efforts.

At the same time, I am very concerned about evidence suggesting inconsistent, erratic and heavy-

handed music license enforcement practices of leading music licensing societies. Under current law creators of music are allowed not only to collect fees at the source, but also along each step of the way. Collecting compensation from both a radio station that plays their music and the local tavern that keeps the radio on as background music, for instance, is pure double-dipping.

Moreover, there is mounting evidence that the enforcement of contracts with the holders of these music copyrights resembles a monopoly. Increases have been demanded despite existing contract terms, only "blanket" licenses have been offered, and the existence of a single court of appeal discourages dispute resolution which can bankrupt a small business.

As a result of all this absurdity, I have worked closely with my colleague, Representative Jim Sensenbrenner from Wisconsin, to make music licensing FAIR. Rep. Sensenbrenner's bill, H.R. 789 will allow

small businesses to play "incidental" or background music on radios or TVS without paying "licensing fees" (royalty fees paid to licensing organizations for the right to play music). Think about it, the last time you were at your favorite diner for breakfast and you hear Michael Jackson's latest hit song. Did you say to yourself, "Gee whiz, I hope this diner is paying Michael Jackson to play this song while I eat my eggs!" I ~~didn't~~ don't think so.

Under current law, the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and other music licensing organizations can demand payment for almost any music played in a place of business, be it live or rebroadcast, and no matter how many times it has already been paid. This means that if any diner, hair salon, or other small business plays a radio or a television, a licensing representative can demand a royalty. That goes for music coming over boom boxes, and cassette and CD players too.

The bottom line is that there is no reason at all why small businesses across New Hampshire and the United States should have to pay just to have the radio playing in their hair salon or the TV on in a bar. It's just plain not fair and it has to stop now -- that is why I am supporting and working to pass H.R. 789.

In closing, I would like to commend the National Restaurant Association for their hard work and dedication and to thank all Members of the Music Licensing Fairness Coalition for addressing this issue of great importance to small business owners. I look forward to the testimony.

Statement of

**PAT ALGER**
Songwriter

On behalf of the
**AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS**

Before the
**HOUSE SMALL BUSINESS COMMITTEE**

May 8, 1996

My name is Pat Alger, I live in Nashville, Tennessee, I am a songwriter, a member of the American Society of Composers, Authors and Publishers, and I serve as President of the Nashville Songwriters Association International. I have attached a biography to my statement which lists some of the songs I have written over the years, songs I hope the members of the Committee have enjoyed. I am proud to say that I have been an ASCAP member for many years.

It is fitting that I testify before this Small Business Committee, because I am about the smallest businessman you can find. Songwriting is my profession and my livelihood. And what I have to say applies to just about every songwriter you can think of, from the most successful to the rank beginner.

I say I am a very small businessman because I have no one (other than my co-writers) to help me earn my way in the world. I have no staff, no secretary, no factory, no office. The intangible "product" that I create comes solely from my

mind. If I am to be successful, the song -- the intellectual property -- I have created must leap enormous hurdles before meeting with acceptance by the public. First, since songwriters are not hired to do their job, they must find work to support themselves and their families while they are attempting to create their music. After they have put words and notes together in a way that they think may have a chance, they have to find a publisher willing to publish it. Then they must find an artist willing to perform it. Then they need to convince a record company to record it. Then they must hope a radio station will broadcast it and that businesses like restaurants and taverns and retail stores will use it to attract and entertain their customers. All these obstacles must be overcome before songwriters can make a living.

If my songs are successful, businesses are using them all across the country -- using them to enhance their appeal to the public and make money from them. When my songs are used by a radio station in Oregon, or a restaurant in Illinois, or a hotel in New Hampshire, it is because they think that music will help their businesses. Oliver Wendell Holmes said it well 80 years ago -- "if music did not pay, it would be given up."

Payment for the use of my musical property is the only thing that enables me to stay in my profession. And I have always believed that payment for the use of property is the

core concept of our country's economic system.

As I told you, I live in Nashville. There is no way that I, or any songwriter, can individually know if those businesses all across the country are using our music, no way we can individually contact them all, and no way we can individually collect fair payment for their use of our property. There's also no way that I can deal on a level playing field with these powerful businesses like chain restaurants or broadcasters that are represented by various associations before you. That's why songwriters -- like Victor Herbert and John Philip Sousa -- together with their publishers formed ASCAP in 1914, and why organizations like ASCAP, BMI and SESAC exist. Through ASCAP and similar organizations, we can find uses of our music, license them at a fair fee, and, if the user refuses to comply with the law, protect our rights in our property.

The royalties songwriters like me earn from ASCAP form the largest single source of our income. Without those royalties, I and my colleagues would have to do something else and we wouldn't be able to create America's music. Yet what sort of burden do these payments for my property place on its users? The average cost to a restaurant for the right to use my music and the music of all my fellow members of ASCAP is $1.58 a day. Indeed, 80% of ASCAP's licensees pay less than a $1.10 a day. Some burden!

You can imagine that I therefore get pretty hot under the

collar when I hear music users say that there's something unfair about the system. What, exactly? Surely it can't be the price. $1.58 a day is less than the cost of a drink! Surely it can't be that ASCAP must allow anyone who requests a license to use my property even if they don't agree with the price. Surely it can't be that ASCAP must treat similar users alike. Surely it can't be that in a legal dispute over price ASCAP, not the user of my property, must prove its fee is reasonable. Surely it can't be the fact that the amount the music users in the United States pay to perform the world's most popular music is practically at the bottom of the scale among developed countries.

The fact is that there is nothing unfair about this system unless it be that songwriters are at an enormous disadvantage in comparison to the users of their music. As ASCAP's illustrious, late president Morton Gould put it: "I never met a music user who thought he was paying too little for music, nor a music creator who thought he was earning too much." They pay lip service to the notion that creators like me should be paid for the use of the property we have created, but what they really want to do is pay less and less and less, or, if they think they can get away with it, nothing at all. That's an outrage, and you should be as outraged about it as I am.

Now let's look at the particular gripes of the people who are seeking to tilt the playing field in their favor through

the pending bills. Please remember that I'm a songwriter, not a lawyer and not one of the business people who operate ASCAP on my behalf. I can't tell you the legal niceties, or the operational details, but I do know unfairness when I see it, and that's what I want to talk to you about.

The restaurant owners behind the pending unfair legislation started by saying that they wanted a complete exemption if they got music from radio broadcasts, and used it to enhance the atmosphere of their places. First, they said my music was just "incidental" to their business. Well, let me say there isn't a songwriter alive who wakes up in the morning thinking "today I'll write some incidental music that no one wants to pay for." Go into any restaurant or tavern and you'll see parsley on plates, pictures on walls, peanuts on bars, rugs on the floor, tablecloths on the tables. All are incidental to the meal. All are paid for. And just as they are paid for, music must be paid for. Of course, if the music is so incidental to the meal that it is meaningless, the restaurant or tavern owner can save that $1.58 a day by turning it off. His customers can then eat and drink in silence. At that point, they can determine just how "incidental" the music is to their business.

Then they said that the radio station had already paid for the performance of the music. But the radio station wasn't making money from the use of the music in the restaurant -- the restaurant owner was. The restaurant owner

was using radio broadcasts in the same way that he would use live musicians, to entertain the customers. Only it costs him less to do it that way.

Then they said that the existing law, which exempted music use by home-style apparatus, was too vague and led to too much litigation. That we agreed with. So we said (as did the bipartisan leadership of the Intellectual Property Subcommittee), let's sit down together and work something out. We made market place offers to expand the "home-style" exemption. We always have believed that this is a market place dispute between the owners of property and the users of property and should be decided in the market place. All we got was a stone wall. We addressed many other points as well -- we offered a code of conduct for both sides' dealings with each other, regional arbitration of fact disputes regarding our licenses, and instantaneous electronic access to information about our repertoire, which now exists and is available by direct modem, through the Internet, by 800 number, or by mail. And still we were stonewalled.

But then the National Licensed Beverage Association, the group which had started the whole process, came to us and said that they <u>did</u> want to work something out. And, in the course of a long hard day of bargaining, we and they reached an agreement. It would clarify the law. And according to the Congressional Research Service, it would exempt almost 70% of the restaurants and taverns in this country. The only ones

which would pay fees for radio and TV music would be places over 3500 square feet -- the large chain restaurants and similar establishments.

It is regrettable that the NLBA was not given the opportunity to testify about the market place agreement we have reached, while not one, but two representatives of that group for which an exemption of 70 plus percent of their members isn't good enough, are here to complain.

One other major group behind this pernicious legislation is the Religious Broadcasters Music Licensing Committee. These owners of religious format stations are operating commercial enterprises, which use our music and are making huge profits. Let me tell you just how huge. The head of the RBMLC, Ed Atsinger, owns 26 radio stations through his Salem Communications Corp. In May, 1995, he bought KDBX-FM in Portland, Oregon for $1.3 million. The April 15, 1995 edition of Broadcasting & Cable magazine announced that he was selling the station for $14 million -- an increase of 976.9% in a year. In 1994, the ASCAP license fees for all the Salem stations amounted to six-tenths of one percent of their gross revenues. That's the nature of the businesses which believe that by using the word religion they are somehow relieved of their obligation to pay a fair fee. What is worse, to adopt the viewpoint of the religious broadcasters is to state unequivocally that Christian music is to be valued less than other forms of music. We can never accept that premise. And

don't let them fool you -- ASCAP royalties are paid for what's performed on radio to those whose works are performed, and those who write Christian music are paid for the performances of their music.

Yet what is it that these owners of profitable commercial broadcasting enterprises want? First, they want a complete exemption for the use of music in "religious services" which they broadcast. Never mind that the various forms of agreements in place were negotiated with representatives of all types of radio stations and never mind that they make a lot of money from those broadcasts. Why is Christian music worth less than other music? I surely don't think that it is, yet that is what they are telling you. Then, they want to force ASCAP to offer a new form of license agreement because they want to pay even less for the music they do use. Never mind that they're seeking the same relief in federal court in a case to be tried in four months and evidently can't wait for the outcome. That's just not right.

My music is all I've got. It's what I rely on to feed my family, to pay my bills, to provide for my retirement. It is my property. The owners of the restaurants and religious stations testifying before you want to pass legislation that amounts to a "taking" of my property. Surely this Congress in particular believes in market place solutions. Surely this Congress in particular is opposed to the taking of private property.

The representatives of these organizations complain about cost. Yet what they pay is a pittance. I think it's clear where fairness lies, and I hope that you won't let these powerful interests run roughshod over this small businessman and the tens of thousands of his struggling colleagues who work hard everyday to continue to make American music the most popular in the world.

# Pat Alger

Singer/songwriter/guitarist Pat Alger grew up in the small town of LaGrange, Georgia. In the mid-sixties, Pat moved to Atlanta to study architecture at Georgia Tech. While at Tech he began writing songs and performing at folk clubs.

Pat had his first taste of big songwriting success in 1980 when Livingston Taylor recorded "First Time Love" which became a two chart hit - Top 40 Pop and Top 10 Adult Contemporary. In 1981, he moved to Nashville to concentrate on songwriting, building a catalog of material that such people as Nanci Griffith, The Everly Brothers, Dolly Parton, Peter, Paul and Mary, Crystal Gayle, Brenda Lee and many others have recorded. He has two number ones for Kathy Mattea, "Goin' Gone" and "She Came From Fort Worth", as well as her top five hit, "A Few Good Things Remain". Since January of 1991, Pat has scored six number ones: Garth Brooks' "Unanswered Prayers", "The Thunder Rolls","What She's Doing Now", "That Summer"; Hal Ketchum's "Small Town Saturday Night" and Trisha Yearwood's "Like We Never Had A Broken Heart" and is the writer of the top five Don Williams single, "True Love" and Mark Collie's top twenty single, "Calloused Hands". Other cuts include Garth Brooks' "The Night I Called The Old Man Out" from Garth's newest album titled IN PIECES, Kathy Mattea's "Seeds", Hal Ketchum's "Softer Than A Whisper" and Skip Ewing's "Rodeo Romeo".

Pat continues to perform live locally and on the road. From 1984 through 1988, he was the opening act for the Everly Brothers on almost all of their live shows in the US and Europe. His first solo album, "True Love And Short Stories" was released in 1991 on Sugar Hill Records. The critically acclaimed album was distinguished by appearances by Trisha Yearwood, Lyle Lovett, Nanci Griffith and Kathy Mattea. Pat's second album, entitled SEEDS, was released in 1992. It also featured many of Pat's friends, (Garth Brooks, Kathy Mattea, Trisha Yearwood and Tim O'Brien.) Last year, Liberty Records released "Notes And Grace Notes" and sponsored a tour throughout the US and Europe.

Along with his songwriting and performing careers, Pat remains actively involved in various facets of the music industry. He is currently President of the NSAI, National Trustee for NARAS, on the Board of Directors of Leadership Music, on the ASCAP Writer Advisory Committee and recently elected as a Board of Director to the Country Music Association.

In 1991 Pat was elected Songwriter of the Year by the Nashville Songwriters Association International. That year he was also Songwriter of the Year in *Music Row Magazine*, *Radio & Records Magazine* and *Cashbox Magazine* as well as Jukebox Songwriter of the year for ASCAP. In 1992, he won the prestigious Country Songwriter of the Year for ASCAP. Pat was also the recipient of two CMA Triple Play Awards for three number one songs in one year.

**TESTIMONY OF STEPHEN BARBA**
**PRESIDENT, THE BALSAMS GRAND RESORT HOTEL**
**DIXVILLE NOTCH, NH**
**BEFORE THE HOUSE SMALL BUSINESS COMMITTEE**
**MAY 8, 1996**

Madame Chairman and members of the committee. Today is an important day.

My name is Stephen Barba and I first want to say "thank you" for hosting this important hearing--especially, thanks to my good friend, Bill Zeliff, who succeeded me as president of both the New Hampshire Travel Council and the New Hampshire Lodging and Restaurant Association. As a resort owner himself, probably more than anyone, he understands my frustration with this issue, and has been one of the best proponents of fixing the problems that exist with the music licensing societies.

I am the President and Managing Partner of The BALSAMS Grand Resort Hotel, a 212-room seasonal resort high in the White Mountains near the Canadian border. We are a destination resort in our 131st summer season with three rooms of live music and entertainment each night. Our hotel is in a very remote area--in fact, the nearest stoplight is 50 miles away. You may have heard of my town, Dixville Notch. We're the folks who vote first in the New Hampshire primary and the national elections. Dixville Notch may be a small town of 25 but we know a big-city racket when we see one. And that's why I came here today--to tell you why America's music licensing system is well overdue for reform.

I have been in the hospitality business my whole life. I've dealt with almost every kind of contracted supplier and vendor imaginable. But I can honestly say I have never had a business relationship that comes close to resembling the one I have with the music licensing societies--ASCAP and BMI. It is completely one-sided. They bill us, we are forced to pay without knowing how their rates are set, and we have no practical way of contesting a fee we think is unfair. In my business, I've come to find that it is too expensive to "whistle while I work."

As you can see, I'm not alone in my belief. And today I speak for hundreds of business owners in my state. As a past chairman of the American Hotel & Motel Association's national Resort Committee, I have heard the same complaints over and over from colleagues about the unfair pricing and strong-arm tactics of ASCAP and BMI.

Consider the case of my friend, Fritz Koeppel, a New Hampshire hotel owner who was approached by an ASCAP investigator. The inspector said Fritz's piano player had sung *Zip-a-dee-doo-da*--an ASCAP-licensed song--as a request the night before. ASCAP hit Fritz with a lawsuit for $50,000 for that.

Before I go on, let me make one thing clear. Our complaint is not with the songwriters of this country. They certainly have a right to collect royalties for legitimate performances of their music. But we have a big argument with these giant collection agencies that represent the songwriters.

My own eye-opening introduction to music licensing came in my very first year of management at the BALSAMS. I was in my lobby office one morning when three men in suits appeared. They had stayed overnight and heard music being performed in one of our nightclubs. They said they were from ASCAP and that our live band was playing songs copyrighted by ASCAP artists.

Right away, they started threatening my partner and me with a lawsuit. They demanded we sign a contract with them immediately and start paying for licensed music at their rates. And what if I didn't want to pay their fee, we asked? They said the only way we could challenge this fee was to initiate a lawsuit in one, single court in New York City--a ridiculously expensive prospect for any business owner. With a lawsuit and a potential penalty of $20,000 per song hanging over our head, we eventually signed. Today we pay a total of $10,752 each year to ASCAP and BMI. And we can't fight them because it costs more in legal fees than to pay their invoice.

That is why I and thousands of business people like me are imploring Congress to act on this issue. We support a bill, H.R. 789, that would instill some common sense and fairness to music licensing. More than 170 House members--Republicans and Democrats alike--have signed on to H.R. 789. I want to point out two reasons why I support this bill.

First, H.R. 789 would stop licensing groups from "double dipping" on fees. Right now ASCAP and BMI can hit up a hotel or restaurant for licensing fees on background music that comes over television and radios. That is patently unfair because the rights to use that music have already been paid for, usually many times over, by television and radio stations. To then charge us for something as incidental as a jingle on a television commercial that we neither knew would be played nor was the purpose for turning the television on smacks of opportunism.

I want to give you an example to be sure you understand what I mean by unfair "double dipping." Think about when you see Michigan State's marching band play a song at halftime of a nationally televised football game. Now guess how many times ASCAP and BMI collect fees when that song is played over the air. Once? Twice? Three times? No, they collect fees five times from five different sources--once each from the stadium, the national TV network, the local TV station, the local cable system, and -- finally -- from the bar that is showing the game. That's not double dipping, folks, that's quintuple dipping!

Second, I'm glad that H.R. 789 would set up a fair arbitration system. Right now, music licensors have free rein to set and raise fees. They hold the threat of a lawsuit over your head until you pay, and the only place to challenge their invoice is in a single New York City courtroom. Unless you have the money to hire lawyers and fly to New York, you are forced to pay what they say and keep your mouth shut.

H.R. 789 would stop this practice. It sets up a fair third-party arbitration system where by a business owner could settle any contract dispute in their *own state*, without having to hire lawyers and fly all the way to New York City.

Last October, I and some colleagues in New Hampshire met with some representatives of ASCAP and BMI in our state capital, Concord. We discussed our difference of opinion but could not work out any mutually acceptable solution. As a result, I believe H.R. 789 is a necessary step in the right direction. That's why I wrote a letter to my local newspaper explaining why Congressman Zeliff is right to support this bill. But guess what happened on January 31 of this year? An ASCAP representative arrived at my place of business to audit my books to see if more money was due to them. Yes, their contract -- which is essentially demanded on a "take it or leave it" basis -- gives them the right to audit my books, just like the IRS. The audit produced additional fees of $911, plus interest of $693 figured at 1 1/2% interest per month or 18% per year.

From day one, ASCAP and BMI have misrepresented this legislation. It is silly to suggest that this bill will stifle the next generation of songwriters. Hardly. Songwriters and licensing societies will still be compensated handsomely from broadcast networks, cable, satellite systems and from businesses, like mine, that provide entertainment through live and taped music.

It is clear that ASCAP and BMI need to be reined in. State governments have already started recognizing this, in limited ways. In the past year alone, at least 16 states have passed laws cracking down on some of the business practices of these groups. Now it's Congress's turn to address the larger picture. I ask you to move forward on H.R. 789.

Thank you for your consideration.

BMI

Statement of Marvin L. Berenson
Sr. Vice President & General Counsel
BMI
Before the Committee on Small Business
U.S. House of Representatives
Wednesday, May 8, 1996

Madame Chair, Members of the Committee, thank you for this opportunity to testify today on copyright protection. I come here today representing Broadcast Music Inc.'s (BMI's) affiliated songwriters, composers, and music publishers. It is important to realize that BMI represents the songwriter, not the performer. For example, most people have heard of the song, "*New York, New York.*" But who wrote that song? Two songwriters named Fred Ebb and John Kander. They write songs. The same is true for Pat Alger. They don't perform. These songwriters rely upon the royalties they receive from BMI to support themselves. Pat's royalties are administered by ASCAP.

Obviously, you're likely to hear a fair amount today about the plight of the small business person. I trust that you will acknowledge and embrace the fact that, as a genuine entrepreneur, the average songwriter is no less a small business owner of sorts than any tavern, inn or restaurant proprietor. Indeed, songwriters are the ultimate small business people who are able to take nothing more than an idea and transform it into something of value.

This hearing today is very important in our view because it represents the first formal, public opportunity to discuss a very important breakthrough pertinent to copyright protection and music licensing that will be very welcome news for small business men and women in the hospitality industry. The breakthrough that I allude to occurred several months ago when the National Licensed Beverage Association (NLBA), BMI, and the other two performing rights organizations negotiated a compromise accord on qualifications for exemption from music licensing fees. Indeed, under this progressive but prudent agreement, the cost of doing business would improve for thousands of bars, restaurants, liquor stores and other small business

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provide a more efficient and economical system that will benefit songwriters and music publishers. I should, however, stress for the Committee that this initiative was a compromise.

In my limited time, I would like to try to outline for you:

1) what we believe the issues are, and

2) what offers we have made in our efforts to be pragmatic without giving away something that is not ours to give away, nor anyone else's to take away --- a person's intellectual property.

First, perhaps as background, I should touch on the nature of and need for what is known as public performing rights licensing. As you know, the U.S. Constitution recognizes the rights of creators of intellectual property, including those who create music. American music is beloved not just in the U.S., but around the world. The inherent property right of a musical composition (intellectual property) is no different than that of any sort of tangible property that one can see or touch and merits the very same degree of property protection.

When a songwriter creates a musical work, he or she will be compensated to some extent by a record company if a recording artist uses that songwriter's creation on the album. However, the songwriter relies on public performance royalties for his or her livelihood. To simplify the concepts involved here, when a writer's copyrighted song is publicly performed, those who use that music (those who cause it to be publicly performed) must pay for the use of that intellectual property. If someone is publicly performing copyrighted music in a commercial setting, then that music user needs to obtain permission to use the songwriter's property in their business. This is no different than the use of anyone else's property in a commercial setting. For music, that permission usually takes the form of a licensing agreement.

The performing rights organizations -- there are three in the U.S. (BMI, ASCAP, and SESAC) were formed for the purpose of licensing those commercial uses, on behalf of their writers and composers, and collecting license fees on their behalf for the use of that music. While this is not an exact science, our organization works to track, as closely as possible, the various venues of public performances in order to devise a fair system of licenses and subsequent payments of royalties to those whose works have been performed.

It would be nearly impossible for the songwriter to identify everyone who is using music in a commercial setting, and to identify each individual composition being performed in every setting. The administrative costs for both the music user and the songwriter would drive the cost of using music sky high. Hence, the performing rights organizations offer a blanket license. A flat fee paid by the music user entitles them to use any of our works (there are over three million [3,000,000] in our repertoire alone), over radio, television, CD player, or on stage, and know that they are not infringing on the rights of any of our affiliates (BMI's affiliates include over 120,000 writers and composers). The same type of licensing, I believe, holds true for ASCAP and SESAC.

It is not a perfect system, but it has worked well for the songwriter and the music user, both in the United States and worldwide. And it is a reasonable and fair method to ensure writers and composers that their works are being honored. Under the BMI consent decree, we are required to offer the same kind of license to all similarly situated users. That is, a restaurant in California which has the same music policy as a restaurant in Maine will pay the same license fee rate. The same is true for other classes of users.

During a good part of last year, under the aegis of the House Judiciary Committee, we, along with ASCAP and SESAC, met with members of interest groups that formed a coalition supporting the legislation introduced by Mr. Sensenbrenner - H.R. 789. This bill would, in effect,

exempt commercial enterprises from paying for the use of music which enhances their business, if that music is performed via radio or television. Enactment of H.R. 789 in its present form would deny songwriters and composers a large portion of their livelihood, while allowing restaurateurs the use of this property for free. Why should a songwriter be required to donate his property to other commercial enterprises? Doesn't it seem only honest to pay for the use of this musical product? Would Congress legislate that parsley growers be required to give away to restaurants their product because parsley is only incidental to the business? The answer, obviously, is "no."

Now let me return to the agreement we reached with the National Licensed Beverage Association (NLBA) that I mentioned at the outset of my remarks. Our current agreement with the NLBA includes the following exemptions for eating and drinking establishments:

- Any establishment smaller than 3500 gross leasable square feet would be exempt;

- Any establishment using 6 or fewer speakers, with no more than 4 speakers in one room, would also be exempt;

- Any commercial establishment using 3 or fewer televisions of 55" screen size or smaller (with no more than 2 TVS in one room) would also be exempt.

The Congressional Research Service conducted a study on the figures in the compromise and concluded, on the basis of size alone that about 70% of the eating and drinking establishments would be exempt under this proposal. If you add in the equipment exemptions, obviously even more establishments would be exempt.

We feel we gave a great deal in those negotiations -- expanding the current exemption size by 300%. To use an illustration that Committee Members or certainly your staff will understand, the venerable and fun Hill restaurant endearingly known as the Tune Inn would be exempt under this compromise. We reached this agreement in an effort to answer the pleas from the commercial users -- that the "small business" owners needed a break. We feel the compromise reached does indeed address the needs of the small businesses.

The Committee should know that along these same lines BMI, ASCAP and SESAC attempted to negotiate a compromise with the National Restaurant Association and some other members of their coalition. Our overtures to increase the size of a commercial establishment qualifying for an exemption from licensing requirements, increase the size and types of equipment, and other offers, were unacceptable to the Restaurant Association. What was even more frustrating was the NRA feedback that we received was almost a "our way or the highway" style reply. Needless to say, we have still been unable to reach agreement with that powerful trade association.

We truly hope the Committee will not lose sight of the fact that a songwriter's creative work -- their intellectual property -- is private property and deserves the same protection as any other sort of property. Additionally, this copyright protection is not just domestic in nature. We should keep in mind our country's constant efforts to insist on intellectual property protection from our trading partners. If we begin to dismantle copyright protection in this country for this use of music, not only will we trigger reciprocal treatment from some of our trading partners, we risk violating international treaties to which the U.S. is a party. Additionally, we risk jeopardizing other sorts of intellectual property -- books, films, and computer software to name a few -- under a weakened copyright system.

We feel that our compromise with the NLBA is just that: a compromise. I also understand that hundreds of owners and operators of small businesses from around the country have communicated to the Congress their support for this compromise -- ranging from billiard halls to bowling alleys and clubs. These are not typical NLBA members, but rather represent a cross-section of other music users who support this compromise.

In terms of the religious broadcaster issue, we ask: why should the songwriter be denied payment for use of his property when the broadcaster either accepts advertising or sells the air time to a ministry? The broadcaster is a profit-making organization. Should creators of religious music be penalized because of the fact that they are writing religious music? We don't think so.

I hope this has helped shed some light on these issues. Thank you. I welcome any questions.

*Advocating Fairness in Music Licensing for Specialty and Talk Radio*

Edward G. Atsinger III, Chairman
Russell R. Hauth, Executive Director

**A Statement By**

**Stuart Epperson**
**On Behalf of**
**National Religious Broadcasters Music License Committee**

**At a Hearing of the**
**Small Business Committee**
**U.S. House of Representatives**

**May 8, 1996 at 10:00 a.m.**

Madam Chairwoman and members of the Committee, on behalf of the National Religious Broadcasters Music License Committee, and over 700 radio stations we represent, I want to express our appreciation for the time you are devoting this morning to music licensing issues. As a radio station owner, and as First Vice Chairman of National Religious Broadcasters, I can personally attest to the abuses of monopoly power our members suffer at the hands of the music licensing organizations.

Our opponents at this table, ASCAP and BMI, have argued that our differences are just disputes between private parties that should be settled by the courts -- not by Congress. Nothing could be further from the truth.

The problem we face is fairly simple: ASCAP and BMI are government sanctioned monopolies, and any time the government confers that kind of power on private organizations, we believe Congress has a duty to regulate. Unfortunately, a previous lack of oversight by the Justice Department and an absence of policy direction from Congress has allowed these organizations to continue abusing music users in the broadcast industry. And it has led to court cases lasting 10 years or more over the interpretation of consent decrees written 50 years ago.

The answer is not more litigation. ASCAP alone is involved in over 500 pending cases. This is a system that is clearly broken, and Congress needs to fix it.

H.R. 789, which was introduced by Rep. Jim Sensenbrenner and is now cosponsored by 170 of your colleagues from both sides of the aisle, addresses two problems that our members believe are critical:

- The first is a requirement that the music licensing monopolies offer a per program license to radio broadcasters that is a real economic alternative to the blanket license favored by ASCAP and BMI.

- The other provision is a requirement that each music licensing organization provide online access to the repertoire of works for which it is authorized to collect license fees.

These provisions of H.R. 789 introduce an element of fairness by allowing specialty radio broadcasters who play little copyrighted music to pay only for what they use. This is all we have asked!

Furthermore, ASCAP and BMI would be prevented from suing music users for copyright infringement over songs they fail to list in their online data bases.

If Congress passes H.R. 789, we will finally have a licensing system that resembles free-market competition. Radio stations will be able to manage their costs more efficiently either by choosing to playing less copyrighted music or by playing more songs from a lower-priced music licensing organization.

These are the very reasons ASCAP and BMI are fighting so hard against H.R. 789 and similar bills in the Senate. Competition is apparently not in their self-interest.

For over 15 years our committee has tried to negotiate these two points. For 15 years we have had absolutely no success. ASCAP and BMI refuse to budge.

Let me give you an example of how the licensing system works today.

Most radio stations operate under a blanket license which gives them the right to play copyrighted music whenever they choose. Specialty broadcasters represented by my organization use very little music so we try to operate under a per program license which assesses fees based on how many of our program periods contain copyrighted songs each day. Licensing fees in both cases are charged as a percentage of the station's gross revenues, except -- and this is the big problem -- the per program rate is several times higher than the blanket rate.

Let me illustrate. My company owns WAVA here in the Washington, DC area. Our format is mostly Christian teaching and talk, but certain programs may feature a copyrighted song, so we have opted for ASCAP's and BMI's per program licenses.

**Do we pay just for the use of a particular song we play?** No. ASCAP and BMI charge us a percentage of revenues attributable to the entire program period whether we play one song or 20 songs.

**Are we charged the same rate as stations that play music all day long?** No. If we try to use the per program license offered today and we play one hour of music, they will charge us for 3 or 4 hours. Thus, if more than one-third of our programs contain copyrighted music, we could end up paying more than the rock and roll station across the street which broadcasts music 24 hours a day.

There is also the absurd amount of paperwork ASCAP and BMI require us to produce for the right to have their version of a per program license. We must log every single song we play -- 24 hours a day, 7 days a week. These reports must then be sent to ASCAP and BMI each month, and they must be 100% accurate or we are subject to substantial monetary penalties. It is just another obstacle, another disincentive to using the per program license.

**Why would anyone treat their customers this way?** It's a good question. ASCAP and BMI do it because it's simpler and more lucrative to force as many stations as possible to buy the blanket license, and they are, after all, monopolies. They get away with it because there's no competition; we have nowhere else to shop for their music.

I have to tell the members of this committee that our broadcasters deeply resent this unfair, coercive system and respectfully implore Congress to pass H.R. 789 this year. Religious broadcasters, in particular, are beginning to view the obstructive stance of ASCAP and BMI as part of a larger battle with the entertainment industry.

We think to ourselves, every time we play a religious artist, they get paid once, yet we are forced to pay ASCAP and BMI 3 or 4 times. What's going on here? Where's our money going? Does it fund acts that are morally offensive to our listeners and most other Americans?

Religious broadcasters, classical music broadcasters and talk radio -- none of whom use much of ASCAP's and BMI's product -- would be grateful for your help in passing H.R. 789 to bring some fairness to this abusive system.

Again, Madam Chairwoman and members of the Committee, thank you for your attention to these difficult issues. I would like to submit for the record several fact sheets that may answer some questions about per program licenses and blanket licenses that I haven't had time to address in my oral statement.

## INTRODUCTION TO THE PER PROGRAMMING PERIOD LICENSE

**What is a blanket license?** A license granting the right to perform publicly all of the musical works in an organization's repertory for a single fee that does not vary with the amount of music performed.

**What is a per program or programming period license?** A license granting the right to perform publicly all of the musical works in an organization's repertory for a fee that varies depending on how much of the music is performed. Specifically, the fee varies in relation to (i) the number of programs (or programming periods) containing at least one performance of that music or (ii) the revenue attributable to those programs (or programming periods).

**How do ASCAP and BMI price their current radio blanket licenses?** ASCAP's and BMI's radio blanket license each charge a flat percentage of a radio station's "adjusted gross revenue" ("AGR"). In 1995, the ASCAP fee is 1.615% of the station's adjusted gross revenue. The BMI fee is 1.585% AGR (ASCAP and BMI define AGR slightly differently).

**How does ASCAP price its current radio per program license?** ASCAP's per program license fee includes two components that must be added together to obtain the total fee -- a flat base fee (that does not vary with music use) for "incidental" performances of music, plus a percentage of the station's AGR attributable to programs containing <u>feature</u> performances of ASCAP music. The flat incidental fee is .24% AGR. The feature fee is 4.22% of the AGR attributable to programs containing any <u>feature</u> performance of ASCAP music. Because it is virtually impossible to allocate specific dollar revenue to specific programs, AGR is attributed to programs by assigning weights to programs depending on when they occur during the day and multiplying the percentage of weighted program hours featuring ASCAP music by total AGR. Programs may be up to one hour long. The resulting formula is:
.24% AGR + [(4.22% AGR) x (wtd. ASCAP hrs./total wtd. hrs.)].

**How does BMI price its current radio per programming period license?** BMI's license is based on 15 minute programming periods rather than "programs." The 15 minute period more accurately reflects use than ASCAP's hours. A single three minute performance can trigger up to an hour's worth of fee for ASCAP (more, if it carries over between hours), but triggers 15 minutes (unless it carries over) under the BMI license. This is particularly important to stations that typically use very little copyrighted music even in those periods in which they use some copyrighted music. Otherwise, the concepts are the same. The BMI formula is:
.24% AGR + [(4.00% AGR) x (wtd. BMI pds./total wtd. pds.)].

## THE PER PROGRAMMING PERIOD LICENSE SOUGHT BY THE NRBMLC

On behalf of the hundreds of religious, classical music, talk and other radio stations it represents, the NRB Music License Committee seeks a fairly priced, administratively acceptable alternative to the blanket license for stations that perform comparatively little copyrighted music. Given the current state of music licensing, we believe the best way to accomplish this is through a per programming period license (using 15 minute programming periods). The price structure we seek is based on key principles set forth in the Buffalo Broadcasting and Capital Cities cases, which established ASCAP per program licenses for the television industry.

- The per program license fee should be set so that the total fee for a station that plays music at average rate in the industry should be the same under the blanket and per program licenses.[1]

- Because the blanket license covers both incidental and feature performances for a single fee, the comparison of the fee paid by the "average" station under the per program license should include both the incidental and feature components of the per program license fee.

- The per program license should include a flat fee component for incidental performances, which should not exceed the value the society attributes to such uses in its distribution of royalties.[2]

- The per program license fee for feature performances should vary in direct proportion to the percentage of weighted programming periods containing feature performances of the society's music in such a way that the total fee equals (i) the incidental component when no periods contain feature performances of the society's music and (ii) the blanket fee, when the industry

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[1] Given the prevalence of all-music stations in the industry, we believe this would lead to fee equivalence between the two licenses for a station that includes a feature performance of the society's music in about 85 to 90% of its 15 minute programming periods. However, determination of the precise industry average would be a matter for negotiation or judicial determination.

[2] The precise cost for the incidental use fee would be for negotiation or judicial determination. The tie to the society's own valuation of the incidental performances is to ensure there is no price gouging and provide some basis for the court's analysis. It is consistent with the benchmark used in the television industry cases.

average number of weighted periods contain such performances.

- The per program license should not cost any station more than the blanket license.

- ASCAP's costs of administering a per program license should be part of its overall cost of doing business. A reasonable per programming period license is essential to provide price discipline for the society's blanket, so the cost of offering that license should be shared by all.

- No fee should be charged for songs licensed directly, at the source, or by another society, or for fair uses of music. This is essential to permit the development of competitive sources of licenses.

In light of the fact that the societies monitor music use for their own distribution purposes, by 1998, the per period license fee should be based on the society's own monitoring or sampling. Until that time, per programming period reports should be limited to that information which ASCAP reasonably needs to administer the license (e.g., title and artist information).

Penalties for failure to report under the per program license should be reasonable in light of the realities of reporting music and may be imposed only if the missed composition would affect the ASCAP fee.

## Benefits of the NRBMLC Proposal

Equity and Fairness

- The fee paid by a station would be roughly proportional to the amount of music it performs.
- A station that features music in about 30% of its programs would not be required to pay the same fee it would pay under the blanket license to use music 24 hours a day. Its fee would be a little more than one third of the blanket fee.
- ASCAP would not charge more for incidental performances than the value it itself places on those performances.

Control and Competition

- A realistic per program license will allow many stations to gain control of their music use.
- The blanket license destroys competition between sources of music licenses (e.g., other societies and direct licenses) and between sources of programming (e.g., talk).
- If the per program structure is in place, alternative sources of music licenses will have the potential to develop, to the benefit of all.

Removal of Non-Fee Disincentives

- The administrative burdens of the license would not discourage its use.

## ASCAP EXPLOITS ITS MARKET POWER TO THWART COMPETITIVE LICENSING

The Rate Court has repeatedly found that ASCAP explicitly and deliberately uses its overwhelming market power to prevent competition with its blanket license:

- "The Decree was designed to limit ASCAP's ability to exert undue control of the market for music licensing rights through its control of a major portion of the music available for performance and its use of the blanket license as a means to extract non-competitive prices." Buffalo Broadcasting, slip op. at 11; Showtime, 912 F.2d at 570; United States v. ASCAP, 782 F. Supp. 778, 790-91, 811.

- The per-program license "serves as a counterbalance to ASCAP's market power, which is most clearly exercised by its preference for the blanket license." Capital Cities slip op. at 25; Buffalo Broadcasting slip op. at 130-31; United States v. ASCAP, 782 F. Supp. at 810.

- "ASCAP has historically been averse to offering the per-program license due to its fear that licensees would use it . . . to minimize use of ASCAP music." Capital Cities slip op. at 27 (relating Buffalo Broadcasting's findings).

  * "Indeed, as [ASCAP's] present and former general counsels have testified, ASCAP was loath to offer a real per-program alternative, assertedly for fear that the stations would opt for a BMI blanket license and an ASCAP per-program license and thus save themselves money by reducing the presence of ASCAP music in their programming." Buffalo Broadcasting, slip op.at 71.

  * "Since the early 1940's ASCAP has viewed the per-program license as inconsistent with its business interests." Buffalo Broadcasting at 140. "ASCAP has long resisted the use of the per-program license in both radio and television." Id. at 142. ASCAP has made clear its "unyielding opposition to a useable per-program license." Id. at 167.

- "ASCAP's per-program proposal is designed to further its aim of keeping the per-program license technically available, but practically illusory for virtually all stations." Capital Cities, slip op. at 63; Buffalo Broadcasting, slip op. at 148.

- Stations viewed the per program license "as illusory because it was offered at a much higher price than the blanket license and because, according to the testimony of ASCAP's own witnesses, ASCAP was loath to make it more available or affordable." Capital Cities, slip op. at 49.

## THE ASCAP CONSENT DECREE IS AMBIGUOUS, INEFFECTIVE, AND COUNTER-PRODUCTIVE

The forty-one year-old Consent Decree under which ASCAP operates is ambiguous, ineffective, and ultimately counterproductive. The Rate Court has repeatedly noted the shortcomings in the Consent Decree, which make it difficult and expensive to effectuate rational policy and a competitive outcome in music licensing:

- The Rate Court has found that despite the guarantees of the Consent Decree, the "inequality of bargaining power" between ASCAP and the stations (and, presumably, the difficulty and expense of obtaining relief through the Rate Court) has forced stations to accept "per-program rates that ma[k]e the license impractical for most stations," and thus, agreements negotiated with ASCAP "are not indicative of a competitive market." Capital Cities, slip op. at 60-62.

- In the New England Continental Media case, the Court agreed with the applicants that an incidental use fee that is independent of actual use is "eminently sensible" and that it would be "extremely difficult" for radio stations to track all incidental uses of ASCAP music, but concluded that it lacks the power under the Decree to set such a fee even when both parties propose it. Slip op. at 15-16.

- The Rate Court similarly noted in Capital Cities that "just because a fee structure may be reasonable does not give this Court the authority to impose it." Slip op at 75, n.33. Indeed, where such a license is not explicitly authorized by the 41 year-old Consent Decree, "if the applicants believe that the license they request furthers the antitrust goals of the Consent Decree," they have no legal recourse whatsoever; their only recourse is "to attempt to persuade either ASCAP or the Justice Department, parties to the Decree, to move this Court to amend the Decree." Id.

- Because the Consent Decree defines ASCAP's legal obligations through ambiguous terms such as the need to provide a "reasonable" license, and the need to provide a "genuine choice" between per program and blanket licenses, with no more explicit guidance, the Consent Decree invites decades-long, expensive, fact-intensive litigation that discourages music users from asserting their rights:

  * Our own experience confirms the Rate Court's refusal to determine ASCAP's legal obligations under the Decree absent particularized factual findings about the applicants. Despite the fact that the Decree applies to both radio and television, and despite finding that the typical station "equivalence formula" it decreed for television stations in Buffalo Broadcasting is "intuitively appealing," the Court in New England Continental Media held that it must "await the development of the record at trial" to find whether such a formula applies to the applicants.

Statement of

Edward P. Murphy
President and CEO
National Music Publishers' Association, Inc.

Hearing on
"Small Business Copyright Protection"
before the
House Committee on Small Business

May 8, 1996

My name is Edward P. Murphy. I serve as the President and Chief Executive Officer of the National Music Publishers' Association ("NMPA").

NMPA is a trade association representing more than 600 music publishers -- businesses that own and administer copyrights in musical compositions. The Harry Fox Agency, an NMPA subsidiary, serves as licensing agent for more than 14,000 music publishers in connection with the use of music in the United States on records, tapes, CDs and on-line delivery. HFA also licenses music on a worldwide basis for use in multimedia productions, films, commercials, television programs, and all other types of audio-visual applications.

Music publishers, generally speaking, are holders of copyright in musical works. The publishers' role is to nurture the creativity of songwriters and composers through artistic, professional and economic support. Some music publishers are subsidiaries of large, multinational entertainment companies. Thousands more, however, are small and medium-sized businesses, some representing the catalogue of a single writer. It is increasingly common, in fact,

for writers to serve as their own publishers and to establish business enterprises for that purpose. The music publishing community has active hubs in New York, California and Tennessee, but publishers operate in every region, throughout the United States.

NMPA appreciates this opportunity to provide its views on issues raised by music licensing bills currently pending before Congress, including H.R. 789. These proposals generally seek to exempt various users of music -- restaurants, taverns, certain broadcasters and others -- from the obligation to pay license fees for the use of musical works.

The music licensing proposals, without question, would have a significant, negative impact on a principal source of income for all songwriters and music publishers -- income derived from the public performance of music. But the immediate threat and unfairness of denying American music creators and copyright owners the right to seek compensation for the use of their works as a matter of U.S. law is only part of the harm the proposals stand to engender. In NMPA's view, they also have serious implications for U.S. compliance with existing international obligations and for the ability of American music creators and copyright owners to continue to receive fair treatment in foreign markets.

The U.S. Congress and recent Administrations -- Republican and Democrat alike -- have worked diligently to ensure that American music and other creative works of American authors receive adequate and effective protection in foreign markets. Key to the success of these efforts has been steps

to promote our trading partners' full and fair implementation of their obligations under the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").

NMPA believes H.R. 789 runs afoul of U.S. obligations under the Berne Convention and, if enacted, could seriously undermine U.S. efforts and credibility in seeking meaningful copyright protection abroad.

H.R. 789 would, among other things, amend section 110(5) of the Copyright Act to exempt from the obligation to pay copyright royalties public performances by means of television or radio sets located in bars, restaurants and other business establishments unless a direct or indirect charge is made to hear the performances. An exemption of this breadth exceeds the scope of Berne-compatible derogations from the exclusive public performance right.

Article 11 of the Berne Convention requires member countries to grant authors of musical works the exclusive right to authorize the public performance of their works and any communication to the public of the performance of their works. Article 11bis(1) makes clear that the right of communication to the public extends to "public communication by loudspeaker or any other analogous instrument transmitting by signs, sound, or images the broadcast of the work." Articles 11 and 11bis do not provide for any relevant exceptions to or exemptions from these rights. International practice condones only certain "minor

reservations," such as the performance of musical works as part of religious services or by military bands in certain limited circumstances.[1]

The current language of section 110(5) of the Copyright Act exempts the communication of a transmission embodying a performance or display of a work by the public reception on "a single receiving apparatus of a kind commonly used in private homes" (emphasis added), unless a direct charge is made or the transmission received is further transmitted. An ad hoc group of experts assembled by the U.S. Department of State to evaluate the Copyright Act in advance of U.S. adherence to the Berne Convention viewed the current section 110(5) exemption as consistent with Berne largely because of its narrow focus on the single receiving device common in home use.[2] The ad hoc group based its assessment on World Intellectual Property Organization guidance on the intent and proper interpretation of Article 11bis:

> In places where people gather (cafes, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc.) the practice is growing of providing broadcast programmes .... The question is whether the license given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may not be for commercial ends.
>
> The Convention's answer is "no." Just as, in the case of a relay of a broadcast by wire [cable], an additional audience is

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[1] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), World Intellectual Property Organization, WIPO Pub. No. 615(E) at 65 (1978) (hereinafter "WIPO Guide").

[2] Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, reprinted in 10 Colum.-VLA J.L. & Arts 513, 528-529 (1986).

> created, so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his license to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new performance of this work.[3]

By amending the scope of the existing section 110(5) exemption to delete the reference to apparatus of kind commonly used in private homes and to allow -- if not encourage -- the use of multiple receiving devices, H.R. 789 and similar proposals appear to exceed the bounds of accepted and acceptable minor reservations. In practice, such an overbroad exemption would serve to deprive music creators and copyright owners of rights and royalty payments to which the Berne Convention dictates they should be entitled.

Moreover, the resulting harm would not be limited to the loss of domestic revenues. Nations that follow the accepted view on minor reservations can be expected to criticize the approach reflected in H.R. 789 and to point to it in defense of Berne-incompatible provisions in their own domestic laws. Of equal concern, a broadened exemption in U.S. law could serve as an unfortunate "model" for other countries' legislative reforms and could ultimately reduce royalties earned in foreign markets. As the Committee is well aware, the

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[3] WIPO Guide at 68-69.

copyright industries -- of which music is an important part -- post one of the most significant positive contributions to the U.S. balance of trade.

Finally, we are concerned that failure to satisfy Berne Convention obligations will subject the U.S. law to challenge under the terms of the World Trade Organization ("WTO") Dispute Settlement Understanding. The United States, through three Administrations and with bipartisan Congressional support, worked hard to see Berne Convention standards of copyright protection backed up by the "teeth" of an international enforcement mechanism. This was accomplished through the Agreement on Trade Related Aspects of Intellectual Property ("TRIPs") concluded as part of the Uruguay Round. It makes no sense now for the United States to take legislative action that so blatantly scoffs at both the Berne Convention and the WTO dispute resolution process that will serve as the mechanism for enforcement of TRIPs obligations.

H.R. 789 would do incalculable damage to the interests of America's writers and owners of copyrighted music. In NMPA's view, the bill stands to prejudice the position of the United States in seeking improved levels of intellectual property protection in foreign markets and would expose our nation to international criticism and even sanction for failure to satisfy our obligations under the Berne Convention.

H.R. 789 is not about "fairness." It is about breaking well-established international rules. We urge members of the Committee to consider the

implications of pending music licensing proposals not only on music users, but on the legitimate interests of music creators and copyright owners, domestically and abroad.

**STATEMENT OF CHARLES F. (RICK) RULE**
**CONCERNING H.R. 789**

**BEFORE THE COMMITTEE ON SMALL BUSINESS**
**OF THE U.S. HOUSE OF REPRESENTATIVES**
**MAY 8, 1996**

It is an honor and a privilege to be invited to testify before this committee on H.R. 789, the Fairness in Musical Licensing Act of 1995. My name is Rick Rule, and I am a partner at the law firm of Covington & Burling. Prior to joining the firm, I served in the Antitrust Division of the Department of Justice from 1982 until 1989. From late 1986 until I left the Department, I was the Assistant Attorney General in charge of the Division. Among the responsibilities of that job is the enforcement of the consent decrees against ASCAP and BMI, and, during my tenure, I had the "pleasure" of wrestling with various issues under those decrees.

I appear before the committee in what, for a lawyer, is a somewhat unusual role -- I am representing no client. The views I express are my own and not those of my partners or our clients. Nevertheless, the Committee should note that on behalf of our client, the National Football League, my partner Neil Roman has submitted a statement for the record. In that statement, the NFL makes the altogether sensible recommendation that a bill such as H.R. 789 that purports to address fairness in <u>musical</u> licensing should be carefully focused on non-dramatic musical works and should not (as H.R. 789 currently does) sweep other copyrighted works, such as

professional sports broadcasts, into an overly broad exception to copyright protection.

While I agree with the NFL's statement and the changes that it recommends to H.R. 789, I do not intend to address that issue this morning. Instead, I will try to respond to the Committee's request for some background on the ASCAP and BMI consent decrees and on some of the antitrust and copyright issues inherent in those decrees. I will also mention some of the ways other than legislation that restaurant owners and others who feel aggrieved by the licensing tactics of ASCAP and BMI might try to change or prohibit those practices. My own personal view is that, if it is determined that society is made worse off by the way in which ASCAP and BMI deal with those small commercial establishments that "incidentally" perform non-dramatic musical works (though it is not clear to me that society is), then legislation is the preferable mode of solution.

**BACKGROUND**

Whether one loves or hates ASCAP and BMI, it is hard to imagine an effective system of copyright protection for musical compositions in this day and age without some enforcement organization like them. From 1897, when the copyright law vested in the owner of a copyrighted work the exclusive right to perform the work for profit, until 1914, when a handful of composers formed ASCAP, composers had no practical way to enforce their performance rights. The cost

of negotiating individual agreements between the multitude of copyright owners and the various venues (e.g., theaters, night clubs, bandstands, and broadcasters) within which the works might be performed was prohibitive. Moreover, it was simply impossible for each composer on his or her own to monitor all the venues throughout the country in order to detect and deter infringing performances.

ASCAP filled the void, dramatically reducing the transactions costs of licensing performance rights and creating an efficient mechanism for policing infringement. ASCAP provided blanket licenses to venues, granting them the ability to perform any composition within ASCAP's catalog in exchange for a single fee. The venues could then perform a chosen musical work without having to track down and negotiate a license with the owner(s); copyright owners would not have constantly to monitor licensed venues in order to detect infringement; and the owners of the performed works would get compensated even if they were unaware of the performance.

Nothing, of course, is perfect, and so it goes with ASCAP. While combining a vast number of compositions in a single catalog and selling blanket licenses to that catalog is an engineer's dream of efficiency, it is an antitrust lawyer's nightmare of reduced competition. To work, ASCAP essentially must eliminate competition among independently copyrighted works. By taking a blanket license, the performer of the copyright forgoes his or her ability to play copyright owners

against one another in order to get the most competitive licensing arrangement.

In a very short time, ASCAP came to control a monopoly share of copyrighted composition, and with that share came the power to set the price of licenses with little if any competitive constraints. In the 1930s, radio broadcasters like CBS, concerned largely about the lack of competition for ASCAP, formed the rival licensing organization BMI. For various reasons, however, BMI failed to inject much competition into the process.

Also during the 1930s, ASCAP (and shortly thereafter BMI) became the target of antitrust. In 1941, both ASCAP and BMI entered into consent decrees regulating their licensing practices. In 1950, after, among other things, successful private antitrust suits challenging the way in which ASCAP licensed "synchronization" and performance rights to motion picture producers and exhibitors, ASCAP and the Department agreed to a completely modified decree.[1/] That decree, inter alia, requires ASCAP to issue licenses, prohibits it from engaging in price discrimination, limits it to obtaining non-exclusive licenses from copyright holders, and provides a mechanism through which a potential licensee may have the court set a reasonable license fee.

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[1/] BMI agreed to a new decree in 1966. Though the ASCAP and BMI decrees do differ in various respects, they tend to regulate the organizations' operations similarly.

**CHALLENGES TO THE STATUS QUO**

To this day, ASCAP and BMI remain subject to Department of Justice consent decrees. Moreover, those decrees, practically speaking, provide on-going regulation of the organizations' licensing practices. The decrees in theory provide certain third-party rights and protections to licensees of performance rights, including owners of small commercial establishments. I presume (though I have not attempted to draw an independent conclusion) that the decrees do not provide small commercial establishments with sufficient protection (at least from the perspective of those establishments) against unreasonable and abusive claims by ASCAP and BMI. If the decrees are inadequate, are there any options other than legislation available? In theory, there are several; however, they are all probably inferior to legislation -- I repeat, assuming there really is a problem.

First, an establishment or a trade organization of establishments such as the National Restaurant Association might consider filing a private antitrust action challenging the practices of ASCAP and/or BMI. It would not be the first time such a suit has been filed. However, even though some of the early private suits met with some success (see, e.g., Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888 (S.D.N.Y. 1948)), plaintiffs have lost the more recent cases.

The most famous of the more recent private actions was brought by CBS on the theory that the blanket licenses

provided by ASCAP and BMI to broadcast networks amount to per se illegal price fixing (because a single price is set for multiple competing copyrighted musical works) and tying (because a licensee is forced to take a license for all the compositions in the catalog). That case ultimately found its way to the Supreme Court. In one of the most important antitrust decisions in the last thirty years, the Court held that the blanket license had to be examined under the rule of reason. BMI, Inc. v. CBS, Inc., 441 U.S. 1 (1979). Suffice it to say that in light of the tremendous inherent efficiencies of a blanket license and against the background of the Department of Justice decrees, it is very difficult for a plaintiff to prove that ASCAP and/or BMI unreasonably restrain competition.

Second, a licensee or group of licensees might challenge an abusive licensing practice by ASCAP and/or BMI as copyright misuse, which might be established even if it cannot be proven that ASCAP and BMI have violated the antitrust laws.[2/] In its Lasercomb decision, the Fourth Circuit Court of Appeals refused to enforce a copyright against admitted infringers because the copyright holder had enforced a broad non-compete provision against third parties.

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[2/]See Lasercomb America, Inc. v. Reynolds, 911 F.2d 970 (4th Cir. 1990) ("The question is not whether the copyright is being used in a manner violative of antitrust law (such as whether the licensing agreement is 'reasonable'), but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a patent").

According to the court, that broad non-compete was a misuse of the copyright (even if it did not violate the antitrust laws) because the copyright holder attempted to use its copyright "to control competition in an area outside the copyright."[3/]

Lasercomb notwithstanding, it would likely be difficult to prove that ASCAP and/or BMI have misused their copyrights. It is not clear for example that any of the anecdotes amount to a claim that the organizations have attempted to control competition outside the copyrights. More fundamentally, the doctrine of copyright misuse, unlike the doctrine of patent misuse, has not been widely accepted by the courts. Indeed, no court of appeals other than the Fourth Circuit has clearly embraced the doctrine. There is good reason for the reluctance on the part of other courts: the remedy for a misuse -- i.e., non-enforcement of the copyright even against third-parties not affected by the misuse -- is draconian. Moreover, there is reason to be concerned when the enforceability of property rights turns on the whims of what a federal judge believes is good "public policy."

Third, those who feel aggrieved by some practice of ASCAP and/or BMI could try to persuade the Department of Justice to modify the ASCAP and BMI decrees to prohibit the allegedly abusive practice. As explained above, the decrees have been modified before. However, unless ASCAP and BMI were willing to consent to the modification, the Department would

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[3/]911 F.2d at 979.

essentially have to prove through litigation that the challenged practice violates the antitrust laws. The Department, like a private plaintiff, however, would have to surmount the Supreme Court's BMI decision in order to prove the practice unreasonably restrains trade.

None of these options makes as much sense as legislation. As a practical matter, what the National Restaurant Association and others are complaining about is really not an antitrust issue or at least not one that antitrust courts are well equipped to handle. The complaint is not that owners of copyrighted musical works have restrained competition but rather that the law provides them with too much protection of their property rights. It is not clear, however, whether the law gives them too much or not enough.

On the one hand, when a restaurant tunes its sound system to a local radio station to improve its ambiance and to attract more business it is profiting from performance of a non-dramatic musical work. There is some appeal to the argument that the copyright owner has a right to share in those profits. From society's point of view, to the extent that copyright holders effectively cannot share in those profits, then at the margin and in theory fewer copyrighted works will be produced.

On the other hand, there is no way of which I am aware to determine whether we as a country currently devote

too much, too little, or just the right amount of resources to copyright creation. If we devote too many resources to such endeavors, then society will be better off by denying copyright protection to incidental performances of works of music.

There is no correct answer in an absolute sense to this conundrum. Rather it is essentially a political question best resolved in a political forum, namely Congress. I wish we antitrust lawyers could help, but I fear you are on your own on this one!

MAY 8, 1996
PUBLIC HEARING

## HOUSE SMALL BUSINESS COMMITTEE

STATEMENT OF

# TOMMY TAVENNER

SILO INN
OLNEY, MARYLAND

ON BEHALF OF THE
# NATIONAL RESTAURANT ASSOCIATION

Madame Chairwoman and distinguished members of the Committee, thank you for inviting me here today.

My name is Tommy Tavenner, and I own the Silo Inn in Olney, Maryland. My dad opened the restaurant back in 1965, when Olney wasn't a whole lot more than a single intersection. As the town grew up around us, we grew too. We now have about 50 employees at our restaurant and pub. I am testifying today on behalf of the National Restaurant Association, and I thank you for holding this hearing.

First, let me say I'm a musician and a still-practicing amateur composer myself. I *wish* I could say I've gotten far enough to be licensed by ASCAP or BMI...but I haven't. I do, however, understand the importance of protecting authors and publishers.

I've paid licensing fees to ASCAP and BMI for nearly 30 years now. For two nights of live music a week, we pay about $2,400 a year. Sometimes I feel like the biggest fool in Maryland: After all this time, I have no idea what I'm paying for or why I pay what I pay. I have a file as thick as an encyclopedia documenting my efforts to understand the rates. Included in that are what I call the "New York lawyer letters"—the letters from ASCAP threatening me with lawsuits for failure to pay what I'm told to. It's a strange way of doing business. Unfortunately, current law appears to let them get away with it.

"Scam" is a harsh word to use, but I've heard enough stories about my colleagues and their experiences to convince me that "scam" is not an inappropriate word to describe what is happening to us. Let me share some of the other stories with you:

► A BMI agent who came into a Phoenix restaurant during business hours, threw a yelling fit at the restaurant owner and her mother, and threatened to bring in a federal marshal if she didn't sign a new contract.

► A catering hall owner in Maryland leases his facility to dance instructors one night a week. The dance instructors pay $300 for the music. ASCAP asked the hall owner to pay $880—for the same music.

► A Massachusetts bar owner keeps the volume on his TV set turned off but turned it up at the beginning of one World Series game. A few weeks later a music licensing representative called him and demanded money because the game carried a licensed version of the national anthem.

Although ASCAP and BMI have spent thousands of dollars on ads over the past year trying to convince Congress these problems don't exist, the examples of arbitrary prices, litigation threats and abusive collection I've cited are real. I didn't invent them. They actually happened. In fact, they are happening every single day in small businesses around the country.

That's why two years ago the National Restaurant Association joined with a broad coalition of other businesses—including the National Retail Federation, the NFIB and others—to ask Congress to make some changes.

We're not asking for charity, for special treatment or favors of any kind. We're small businessmen and women who pay our own way and pull our own weight. What we want is a fair way to do business.

Our courts have long recognized that whenever a handful of companies control one market, there's a potential for abuse. That's why ASCAP and BMI currently operate under court orders to prevent them from misusing their power. Unfortunately, however, the last 40 years have shown that these orders don't provide any real protection for small businesses.

The biggest problem is that these court orders don't give small businesses any practical way to challenge ASCAP, BMI or SESAC—and the music licensors know it.

If you don't understand the fees, if you object to your being charged one fee while the business down the street is paying a wildly different rate, or if you can't get a straight answer about what music each society represents, you have just one option: To file suit in one federal court in New York City.

To use the word "arbitrary" in describing the tactics of these organizations is the ultimate understatement. In my case, it took me three years to get ASCAP to reduce my fees when we decreased our music program. For the last three and a half months, I've been trying to get a credit I'm entitled to for overpaying in 1995. I can cite example after example of these kind of rate disputes.

But you learn quickly that if you question anything, a lawsuit threat isn't far behind. Over 60% of National Restaurant Association members surveyed recently reported that they had been threatened with lawsuits or other pressure tactics to get them to sign a contract—*even though the music licensing representative had no idea what songs were being played.*

Like most small businesses, I don't have a lawyer on staff; I either have to rely on my own savvy in dealing with ASCAP and BMI or hire a lawyer. Madame Chairwoman, as a small business owner I simply don't have the resources to go up against an army of ASCAP or BMI lawyers in a rate court in New York City. I can't think of a single small business owner I know who could do it.

We need a system that works better for the little guy. I am here to ask you to support H.R. 789, a bill that now has the support of 170 members of the U.S. House and that proposes clear and simple changes that would make it a fairer system.

First, H.R. 789 would make it clear that businesses are not required to pay licensing fees when they flip on a radio or TV in the background. ASCAP, BMI and

SESAC already collect millions in licensing fees for this music from radio and TV broadcasters. To get a business owner to pay up because something we have on in the background—like a commercial jingle that plays during a TV show—is excessive.

Second, let's find a way to resolve fee disputes by arbitration *in the location where we do business.* H.R. 789 would let us take our problems to, and get them resolved by, a third-party arbitrator. The music societies say this is totally unacceptable; they want to force all music users in every state to go to court in New York City.

Third, let's make sure businesses can get information on the product music licensors sell. Right now a business owner who tries to save money by playing music from just one group's song lists is out of luck. That's because ASCAP, BMI and SESAC routinely refuse to provide business customers with these lists. We should at least be able to understand what we're paying for. H.R. 789 requires the music licensors to give us access to paper and on-line lists of their songs.

I also think it's important to tell you what H.R. 789 would not do, because I think there's a lot of misinformation out there. It doesn't exempt any business from paying licensing fees for CDs, tapes or live music. It doesn't deny songwriters royalties.

Before I end, let me add one other thing. The National Restaurant Association, the NFIB and other members of the Music Licensing Coalition have been working to find a resolution both sides can live with. A few months ago, the National Licensed Beverage Association split off and came up with its own "compromise" with ASCAP and BMI. I want to make it clear that the National Restaurant Association, the NFIB, the National Association of Beverage Retailers and other members of the Coalition do NOT support this agreement. While it may cover some of the NLBA needs, it doesn't satisfy a majority of the foodservice industry or other members of the Coalition.

It proposes an extremely narrow business exemption for radio and TV music. I, and a majority of my colleagues with legitimate complaints about the way the music licensors operate, would get nothing out of this plan. It discriminates against retailers. It says nothing about arbitration, one of the most important pieces of H.R. 789. It says nothing about access to music lists.

In the past year 16 states have passed music licensing reform bills. That's nearly one-third of the states, and more are considering it. But some of the biggest problems—like arbitration and a meaningful definition of the business exemption—need federal answers. It's time for Congress to take action.

BMI, ASCAP and SESAC like to portray us as a bunch of greedy small business owners trying to deny fees to songwriters. I'm willing to bet that if a songwriter came to my restaurant and got some idea of the way ASCAP and BMI

charge and collect fees on their behalf, they'd know why we're sitting here today and asking for changes. They'd also know why many of us small business owners are just giving up or cutting back on music rather than deal with these syndicates.

I had to think long and hard about speaking out today against the copyright establishment. Speaking from past experience, I know that could have some serious ramifications; small businesses don't have a lot of power in this very one-sided relationship. But my faith in the system encourages me to be here.

Madame Chairwoman, thousands of small businesses have paid the piper for years. That's not the issue. The issue is whether small businesses should have to pay the piper again for TV and radio music that has already been paid for. The issue is how ASCAP and BMI operate, what information they give to their customers, and where music users can turn when problems develop.

The issue is whether we live under the rule of laws that are clear and fair, or under the arbitrary rules of ASCAP, BMI and SESAC, who for all practical purposes are accountable to no one.

I'd be happy to answer any questions.

**STATEMENT OF GEORGE DAVID WEISS**
**PRESIDENT, THE SONGWRITERS GUILD OF AMERICA**
**ON "SMALL BUSINESS COPYRIGHT PROTECTION"**

**HOUSE COMMITTEE ON SMALL BUSINESS**

**May 8, 1996**

My name is George David Weiss. For more than a dozen years, I have been the nonsalaried, but full-time, president of The Songwriters Guild of America (SGA), representing more than 5,000 independent small businessmen and women who create American music.

SGA is a voluntary membership organization comprised of songwriters throughout the United States and the estates of deceased SGA members. SGA provides contract advice, royalty collection and audit services, catalog administration, and numerous other benefits to our members. I appreciate the opportunity to share with the Small Business Committee SGA's views on the issues surrounding music licensing in the United States.

Although I understand that this is an oversight, not a legislative, hearing, let me be as clear as a Cole Porter lyric -- H.R. 789, the House music licensing bill that many members of this Committee have co-sponsored, is one of the most serious threats ever faced by American songwriters, who have made our music the most popular in the world. It would roll back the copyright protection

for creators of music that has been part of America law for decades. In so doing, it would dismantle the incentives that have made it possible for SGA members to create and to produce music that has swept the globe, music that has contributed substantially in recent years to the positive side of an otherwise bleak American trade balance equation.

I am a working songwriter and am fortunate to have been able to practice my craft full-time for a number of years. You may recognize some of my music. I collaborated on the Elvis Presley hit (and his theme song), "Can't Help Falling In Love." Also, "What a Wonderful World," recorded by the great Louis Armstrong, which was the featured song for the movie "Good Morning Viet Nam," and the more recent film, "Twelve Monkeys." You may know as well "The Lion Sleeps Tonight," "Lullaby of Birdland," "Mr. Wonderful," "Too Close for Comfort," and "That Sunday, That Summer," originally recorded by Nat King Cole and later by his daughter Natalie on her album "Unforgettable."

I make my living as a songwriter. Like many of my colleagues in the industry, songwriting is virtually my only source of income, and the money I earn from the use of my songs supports me and my family. We songwriters

rely entirely on the performing rights societies (ASCAP, BMI, and SESAC) for royalty income when our work is publicly performed. Although songwriters have the ability to create music, we have no ability to track its use by others and to ensure that we receive fair compensation. That is the job of the societies, which license our creations and make certain we have an income on which to live.

Users of our music also benefit from the societies. For without such performing rights organizations, users would be forced to search for every copyright owner whose music was being publicly performed in order to get permission for such performances. Since there are over a billion public performances each year from tens of thousands of different sources, this would be an impossible task.

Like every other American, composers, lyricists, and music publishers deserve to be compensated for the use of our work. While writing songs may strike some people as an easy way to earn a living, I can assure you that it is not. It is extremely hard work, and tremendously competitive, and it is most often only after many years of rejection that a writer -- if he or she is lucky -- begins to make a living in the profession. Many writers,

even with talent, are never able to do so. I would venture to say that less than ten percent of songwriters are able to earn a living solely from creating music.

As I emphasized at the outset, most songwriters are independent small businesspeople. But we are engaged in a business that is far riskier than most. To the extent our work is sold or performed publicly, we should be paid for it -- just like anyone who provides a service or creates a product that is used by his or her customers. Intellectual property is, after all, property.

Some people, however, seemingly do not believe my creations and those of my colleagues deserve the same treatment as a painting, a pair of shoes, or for that matter a wonderful meal or an exotic cocktail. They cannot accept the idea that the performing rights societies should be allowed to act on behalf of songwriters to collect license fees for the use of our work from restaurants, bars, and other businesses that use our creations for commercial gain.

Let me be blunt: these are my songs. I wrote them; they are my property. While I obviously want as many people as possible to enjoy my musical creations, if they are used, I deserve to be paid, even a nominal fee like

that negotiated on my behalf by ASCAP, the society of which I am a member. I should be treated no differently than any other small businessman.

H.R. 789 and similar legislation pending in the Senate would deprive music copyright owners of compensation for uses of our music that benefit the owners of businesses in which radio and television performances are presented. But when the owner of a restaurant, sports bar or retail establishment decides to present radio or television performances, he or she does so because of a belief that these performances will improve the business by enhancing the atmosphere. My music, if played on a radio-over-loudspeaker system in a restaurant or store, entertains customers and pleases employees, stimulating productivity. That is why businesses play our songs -- to improve the environment and their bottom line.

If businesses are making money off the talent of songwriters, we deserve compensation. If businesses truly believe our creations have no effect on their bottom line, they can eliminate the entertainment -- and the need to pay us.

If there are honest disagreements about the

procedures the performing rights societies employ to protect their songwriter members, those practices should be fairly negotiated among the parties -- as has been done over the past several months between the National Licensed Beverage Association (NLBA) and the societies. In fact, under an agreement between NLBA and the societies, nearly 70% of all restaurants would be exempt from license fees for radio and television music. But to suggest that the underlying copyright law be gutted so that creators are no longer compensated at all for their work is manifestly unfair to thousands of hard-working small businesspeople in every state who strive every day to make life more enjoyable by writing the best music in the world.

Songwriters are not alone in their opposition to H.R. 789. The United States Register of Copyrights, the Commissioner of Patents and Trademarks, the Office of the United States Trade Representative, the American Intellectual Property Law Association and the National Federation of Music Clubs, among others, have all condemned this music licensing legislation as terribly misguided public policy. Their concerns mirror our own. As Justice Oliver Wendell Holmes wrote in Herbert v. Shanley in 1917, "If music did not pay, it would be given up." If we are not paid, we will not be able to write,

and a unique American industry -- and one that makes millions abroad to help our trade balance -- will suffer irreparable harm. So, of course, will American culture.

Songwriting is a tough, unpredictable business. Most songwriters struggle to make ends meet. The vast majority of those few who do make millions are singer/songwriters, and they make most of their money from performing -- not writing. Those who only write songs derive most of their income from the royalties they collect through ASCAP, BMI and SESAC.

It comes down to this: I am a working guy -- a small businessman -- with a wife and four children. If I couldn't make a living by writing songs, I'd have to do something else. H.R. 789 and its ilk would make it all but impossible for my colleagues to survive doing what they do best. That would be a terrible loss for songwriters.

But it would be a bigger loss for America.

Thank you.

GENERAL LICENSE AGREEMENT–RESTAURANTS, TAVERNS, NIGHTCLUBS, AND SIMILAR ESTABLISHMENTS

**Agreement** between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("SOCIETY"), located at

and
("LICENSEE"), located at as follows:

1. **Grant and Term of License**

(a) SOCIETY grants and LICENSEE accepts for a term of one year, commencing
and continuing thereafter for additional terms of one year each unless terminated by either party as hereinafter provided, a license to perform publicly at

("the premises"), and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term hereof in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights.

(b) This license authorizes performances by means of "jukebox(es)" as defined in the Rate Schedule attached to and made a part of this Agreement.

(c) This Agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder as to performances rendered, acts done and obligations incurred prior to the effective date of the assignment.

(d) Either party may, on or before thirty days prior to the end of the initial term or any renewal term, give notice of termination to the other. If such notice is given the Agreement shall terminate on the last day of such initial or renewal term.

2. **Limitations on License**

(a) This license is not assignable or transferable by operation of law or otherwise, except as provided in subparagraph "1(c)" hereof, and is limited to the LICENSEE and to the premises.

(b) This license does not authorize the broadcasting, telecasting or transmission by wire or otherwise, of renditions of musical compositions in SOCIETY's repertory to persons outside of the premises, other than by means of a music-on-hold telephone system operated by LICENSEE at the premises.

(c) This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this Agreement, a dramatic performance shall include, but not be limited to, the following:

(i) performance of a "dramatico-musical work" (as hereinafter defined) in its entirety;

(ii) performance of one or more musical compositions from a "dramatico-musical work" (as hereinafter defined) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;

(iv) performance of a concert version of a "dramatico-musical work" (as hereinafter defined).

The term "dramatico-musical work" as used in this Agreement shall include, but not be limited to, a musical comedy, opera, play with music, revue, or ballet.

3. **License Fees and Payments**

(a) In consideration of the license granted herein, LICENSEE agrees to pay SOCIETY the applicable license fee set forth in the Rate Schedule annexed hereto and made a part hereof, based on "LICENSEE's Operating Policy." The term "LICENSEE's Operating Policy" shall mean all of the factors which determine the license fee applicable to the premises under the Rate Schedule.

(b) LICENSEE warrants that the Statement of LICENSEE's Operating Policy attached to and made a part of this Agreement is true and correct as of the date hereof.

(c) The current applicable license fee for the premises is annually, based on the factors set forth in the Statement of LICENSEE's Operating Policy.

(d) LICENSEE agrees to pay SOCIETY the license fee due hereunder in installments of one-third the applicable annual fee in advance on or before January 1, May 1 and September 1 of each year provided, however, that if LICENSEE does not otherwise owe SOCIETY any fees under this or any prior license agreement, and if LICENSEE pays the full annual fee on or before January 31st of any year, the applicable license fee for that year shall be reduced by 20%.

(e) LICENSEE agrees to pay SOCIETY a $25 service charge for each unpaid check, draft or other form of monetary instrument submitted by LICENSEE to SOCIETY.

(f) In the event LICENSEE shall be delinquent in payment of license fees due hereunder by 30 days or more, LICENSEE agrees to pay a finance charge on the license fees due of 1½% per month, or the maximum rate permitted by the law of the state in which the premises licensed hereunder are located, whichever is less, from the date such

(g) In the event that LICENSEE's payment of fees under this Agreement causes SOCIETY to incur a liability to pay a gross receipts, sales, use, business use, or other tax which is based on the amount of SOCIETY's receipts from LICENSEE, the number of licensees of SOCIETY, or any similar measure of SOCIETY's activities, and (i) SOCIETY has taken reasonable steps to be exempted or excused from paying such tax; and (ii) SOCIETY is permitted by law to pass through such tax to its licensees, LICENSEE agrees to pay to SOCIETY the full amount of such tax.

4. **Changes in LICENSEE's Operating Policy**

(a) LICENSEE agrees to give SOCIETY thirty days prior written notice of any change in LICENSEE's Operating Policy. For purposes of this Agreement, a change in LICENSEE's Operating Policy shall be one in effect for at least thirty days.

(b) Upon any change in LICENSEE's Operating Policy resulting in an increase in the license fee, based on the annexed Rate Schedule, LICENSEE agrees to pay SOCIETY the increased license fee, effective as of the initial date of such change, whether or not written notice of such change has been given pursuant to subparagraph "4(a)" hereof.

(c) Upon any change in LICENSEE's Operating Policy resulting in a reduction in the license fee, based on the annexed Rate Schedule, LICENSEE shall be entitled to the reduction, effective as of the initial date of such change, and to a *pro rata* credit for any unearned license fees paid in advance, provided LICENSEE has given SOCIETY thirty days prior written notice of such change. If LICENSEE fails to give SOCIETY thirty days prior written notice, any reduction and credit shall be effective thirty days after LICENSEE gives SOCIETY written notice of the change.

(d) Within thirty days of any change in LICENSEE's Operating Policy, LICENSEE shall furnish to SOCIETY a current Statement of LICENSEE's Operating Policy and shall certify that it is true and correct.

(e) If LICENSEE discontinues the performance of music at the premises, LICENSEE or SOCIETY may terminate this Agreement upon thirty days notice, the termination to be effective at the end of the thirty day period. In the event of such termination, SOCIETY shall refund to LICENSEE a *pro rata* share of any unearned license fees paid in advance. For purposes of this Agreement, a discontinuance of music shall be one in effect for no less than thirty days.

5. **Breach or Default**

Upon any breach or default by LICENSEE of any term or condition herein contained, SOCIETY may terminate this license by giving LICENSEE thirty days notice to cure the breach or default, and in the event that it has not been cured within the thirty day period, this license shall terminate on the expiration of that period without further notice from SOCIETY to LICENSEE.

6. **Interference in SOCIETY's Operations**

In the event of:

(a) any major interference with the operations of SOCIETY in the state, territory, dependency, possesion or political subdivision in which LICENSEE is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

(b) any substantial increase in the cost to SOCIETY of operating in such state, territory, dependency, possession or political subdivision, by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

SOCIETY shall have the right to terminate this Agreement forthwith by written notice and shall refund to LICENSEE any unearned license fees paid in advance.

7. **Notices**

All notices required or permitted to be given by either party to the other hereunder shall be duly and properly given if:

(a) mailed to the other party by registered or certified United States Mail; or

(b) sent by electronic transmission (i.e., Mailgram, facsimile or similar transmission); or

(c) sent by generally recognized same-day or overnight delivery service,

addressed to the party at the address stated above. Each party agrees to inform the other of any change of address.

IN WITNESS WHEREOF, this Agreement has been duly executed by SOCIETY and LICENSEE

this day of , 19

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By _____

_____
Title

By _____

_____
Title

(Fill in capacity in which signed
(a) If corporation, state corporate office held;
(b) If partnership, write word "partner" under signature of signing partner;
(c) If individual owner, write "individual owner" under signature.)

## STATEMENT OF OPERATING POLICY

ROOM NO. _____

Indicate only applicable factors:

I. Seating Capacity _____

| II. Live Entertainment | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|---|
| A. Single instrumentalist | ☐ | _____ | Su M Tu W Th F Sa |
| B. Two or more instrumentalists | ☐ | _____ | Su M Tu W Th F Sa |

| III. Mechanical music not otherwise licensed | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|---|
| A. Audio-only | | | |
| 1. Compact discs | | _____ | Su M Tu W Th F Sa |
| 2. Jukebox | ☐ | _____ | Su M Tu W Th F Sa |
| 3. Karaoke | ☐ | _____ | Su M Tu W Th F Sa |
| 4. Radio-over-speakers | ☐ | _____ | Su M Tu W Th F Sa |
| 5. Records | ☐ | _____ | Su M Tu W Th F Sa |
| 6. Tapes | ☐ | _____ | Su M Tu W Th F Sa |
| 7. Other_____ | ☐ | _____ | Su M Tu W Th F Sa |

| B. Audio-Visual | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|---|
| 1. Karaoke with video | ☐ | _____ | Su M Tu W Th F Sa |
| 2. Large-screen television | ☐ | _____ | Su M Tu W Th F Sa |
| Approximate screen size:_____inches diagonally | | | |
| 3. Laser disc | ☐ | _____ | Su M Tu W Th F Sa |
| 4. Multiple televisions | ☐ | _____ | Su M Tu W Th F Sa |
| 5. Video cassette recorder | ☐ | _____ | Su M Tu W Th F Sa |
| 6. Video jukebox | ☐ | _____ | Su M Tu W Th F Sa |
| 7. Other (describe)_____ | ☐ | _____ | Su M Tu W Th F Sa |

IV. Mechanical music furnished by licensed background music supplier ☐

Name and address of supplier: _____

_____

_____

| V. Variables | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|---|
| A. Act(s) | ☐ | _____ | Su M Tu W Th F Sa |
| B. Dancing and/or disc jockey | ☐ | _____ | Su M Tu W Th F Sa |
| C. Show | ☐ | _____ | Su M Tu W Th F Sa |
| D. Vocalist(s) | ☐ | _____ | Su M Tu W Th F Sa |

| VI. Charges made: $_____ | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|---|
| A. Admission | ☐ | _____ | Su M Tu W Th F Sa |
| B. Cover | ☐ | _____ | Su M Tu W Th F Sa |
| C. Entertainment | ☐ | _____ | Su M Tu W Th F Sa |
| D. Minimum | ☐ | _____ | Su M Tu W Th F Sa |
| E. Similar charge (describe) _____ | | _____ | Su M Tu W Th F Sa |

| VII. Alternate or relief music provided by instrumentalist(s) ☐ | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|
| | _____ | Su M Tu W Th F Sa |

VIII. Jukebox (see definition in Rate Schedule): Yes ☐ No ☐

A. Number of jukeboxes:_____

IX. Music-on-hold: Yes ☐ No ☐

X. Number of rooms with musical entertainment _____

(If music is performed in more than one room, fill out and attach a separate Statement of Operating Policy for each room)

XI. If seasonal operation, indicate seasonal period: Opening date _____ Closing date _____

Rate based on above policy $ _____

(If more than one room, total rate for premises $ _____)

# STATEMENT OF OPERATING POLICY

OWNER _____

PREMISES _____

FULL ADDRESS _____

_____ ZIP CODE _____

TELEPHONE NO. _____ ROOM NO. _____

Indicate only applicable factors:

I. Seating Capacity _____

| II. Live Entertainment | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|---|
| A. Single instrumentalist | ☐ | _____ | Su M Tu W Th F Sa |
| B. Two or more instrumentalists | ☐ | _____ | Su M Tu W Th F Sa |

| III. Mechanical music not otherwise licensed | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|---|
| A. Audio-only | | | |
| 1. Compact discs | | _____ | Su M Tu W Th F Sa |
| 2. Jukebox | ☐ | _____ | Su M Tu W Th F Sa |
| 3. Karaoke | ☐ | _____ | Su M Tu W Th F Sa |
| 4. Radio-over-speakers | ☐ | _____ | Su M Tu W Th F Sa |
| 5. Records | ☐ | _____ | Su M Tu W Th F Sa |
| 6. Tapes | ☐ | _____ | Su M Tu W Th F Sa |
| 7. Other_____ | ☐ | _____ | Su M Tu W Th F Sa |
| B. Audio-Visual | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
| 1. Karaoke with video | ☐ | _____ | Su M Tu W Th F Sa |
| 2. Large-screen television | ☐ | _____ | Su M Tu W Th F Sa |
| Approximate screen size:_____inches diagonally | | | |
| 3. Laser disc | ☐ | _____ | Su M Tu W Th F Sa |
| 4. Multiple televisions | ☐ | _____ | Su M Tu W Th F Sa |
| 5. Video cassette recorder | ☐ | _____ | Su M Tu W Th F Sa |
| 6. Video jukebox | ☐ | _____ | Su M Tu W Th F Sa |
| 7. Other (describe)_____ | ☐ | _____ | Su M Tu W Th F Sa |

IV. Mechanical music furnished by licensed background music supplier ☐

Name and address of supplier: _____

_____

_____

| V. Variables | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|---|
| A. Act(s) | ☐ | _____ | Su M Tu W Th F Sa |
| B. Dancing and/or disc jockey | ☐ | _____ | Su M Tu W Th F Sa |
| C. Show | ☐ | _____ | Su M Tu W Th F Sa |
| D. Vocalist(s) | ☐ | _____ | Su M Tu W Th F Sa |

| VI. Charges made: $_____ | | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|---|
| A. Admission | ☐ | _____ | Su M Tu W Th F Sa |
| B. Cover | ☐ | _____ | Su M Tu W Th F Sa |
| C. Entertainment | ☐ | _____ | Su M Tu W Th F Sa |
| D. Minimum | ☐ | _____ | Su M Tu W Th F Sa |
| E. Similar charge (describe) _____ | | _____ | Su M Tu W Th F Sa |

| VII. Alternate or relief music provided by instrumentalist(s) ☐ | No. Days/Nights Per Week | Days/Nights Used (Circle) |
|---|---|---|
| | _____ | Su M Tu W Th F Sa |

VIII. Jukebox (see definition in Rate Schedule): Yes ☐ No ☐

A. Number of jukeboxes:_____

IX. Music-on-hold: Yes ☐ No ☐

X. Number of rooms with musical entertainment _____

(If music is performed in more than one room, fill out and attach a separate Statement of Operating Policy for each room)

XI. If seasonal operation, indicate seasonal period: Opening date _____ Closing date _____

Rate based on above policy $ _____

(If more than one room, total rate for premises $ _____)

# RATE SCHEDULE

LICENSE FEES FOR CALENDAR YEAR 1996

This Rate Schedule applies to Bars, Grills, Taverns, Restaurants, Lounges, Supper Clubs, Night Clubs, Ballrooms, Dance Clubs, Discos, Piano Bars, Cabarets, Roadhouses and similar establishments.

| | | LIVE MUSIC—SINGLE INSTRUMENTALIST | | | | | | LIVE MUSIC—TWO OR MORE INSTRUMENTALISTS | | | | | | NO LIVE MUSIC | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | Mech Music Audio-Only (C) | Mech Music with A/V (D) | | | | | Mech Music Audio-Only (C) | Mech Music with A/V (D) | Mech Music Audio-Only (C) | | | Mech Music With A/V (D) | | |
| | | | NO. OF VARIABLES (B) | | | | | | NO. OF VARIABLES (E) | | | | | | NO. OF VARIABLES (F) | | | NO. OF VARIABLES (F) | |
| Seating Capacity (A) | No. Days/ Nights Per Week | Base Rate | (1) | (2) | (3) | Add | Add | Base Rate | (1) | (2) | (3) | Add | Add | Base Rate | (1) | (2) | Base Rate | (1) | (2) |
| 75 & under | 1 | $ 224 | $ 296 | $ 394 | $ 528 | $ 86 | $131 | $ 296 | $ 394 | $ 528 | $ 704 | $ 86 | $ 131 | $ 202 | $ 296 | $ 394 | $ 302 | $ 445 | $ 591 |
| | 2-3 | 309 | 407 | 541 | 724 | 112 | 168 | 443 | 592 | 788 | 1048 | 112 | 168 | 224 | 407 | 541 | 336 | 610 | 812 |
| | 4-7 | 380 | 505 | 676 | 912 | 135 | 204 | 592 | 788 | 1048 | 1404 | 135 | 204 | 246 | 505 | 676 | 369 | 759 | 1016 |
| 76-150 | 1 | 296 | 394 | 528 | 703 | 123 | 185 | 394 | 528 | 703 | 936 | 123 | 185 | 289 | 394 | 528 | 435 | 591 | 795 |
| | 2-3 | 443 | 592 | 788 | 1048 | 160 | 241 | 592 | 788 | 1048 | 1404 | 160 | 241 | 322 | 592 | 788 | 483 | 888 | 1181 |
| | 4-7 | 592 | 788 | 1048 | 1404 | 197 | 294 | 788 | 1048 | 1404 | 1873 | 197 | 294 | 355 | 788 | 1048 | 533 | 1181 | 1571 |
| 151-225 | 1 | 394 | 528 | 703 | 938 | 160 | 241 | 528 | 703 | 936 | 1257 | 160 | 241 | 378 | 578 | 703 | 566 | 795 | 1056 |
| | 2-3 | 592 | 788 | 1048 | 1404 | 210 | 316 | 799 | 1056 | 1419 | 1884 | 210 | 316 | 420 | 788 | 1048 | 631 | 1181 | 1571 |
| | 4-7 | 788 | 1048 | 1404 | 1873 | 259 | 390 | 1056 | 1419 | 1884 | 2513 | 259 | 390 | 462 | 1048 | 1404 | 694 | 1571 | 2106 |
| 226-300 | 1 | 489 | 654 | 873 | 1168 | 197 | 294 | 664 | 886 | 1182 | 1575 | 197 | 294 | 467 | 654 | 873 | 700 | 980 | 1308 |
| | 2-3 | 742 | 985 | 1317 | 1761 | 259 | 390 | 999 | 1330 | 1774 | 2363 | 259 | 390 | 518 | 985 | 1317 | 777 | 1479 | 1976 |
| | 4-7 | 985 | 1317 | 1761 | 2342 | 322 | 483 | 1330 | 1774 | 2363 | 3154 | 322 | 483 | 570 | 1317 | 1747 | 855 | 1976 | 2622 |
| 301-375 | 1 | 592 | 788 | 1048 | 1404 | 233 | 350 | 799 | 1071 | 1428 | 1898 | 233 | 350 | 553 | 788 | 1048 | 829 | 1181 | 1571 |
| | 2-3 | 886 | 1182 | 1575 | 2102 | 309 | 463 | 1209 | 1604 | 2142 | 2843 | 309 | 463 | 614 | 1182 | 1575 | 919 | 1774 | 2363 |
| | 4-7 | 1182 | 1575 | 2102 | 2794 | 380 | 570 | 1604 | 2130 | 2843 | 3793 | 380 | 570 | 674 | 1575 | 2102 | 1013 | 2363 | 3154 |
| 376-450 | 1 | 692 | 924 | 1230 | 1640 | 271 | 406 | 936 | 1244 | 1662 | 2217 | 271 | 406 | 643 | 924 | 1230 | 966 | 1388 | 1846 |
| | 2-3 | 1034 | 1390 | 1837 | 2451 | 360 | 540 | 1404 | 1873 | 2499 | 3323 | 360 | 540 | 713 | 1378 | 1837 | 1070 | 2066 | 2755 |
| | 4-7 | 1378 | 1849 | 2451 | 3264 | 443 | 664 | 1873 | 2499 | 3323 | 4435 | 443 | 664 | 784 | 1849 | 2451 | 1178 | 2772 | 3676 |
| 451-525 | 1 | 692 | 924 | 1230 | 1640 | 271 | 406 | 1071 | 1428 | 1908 | 2536 | 309 | 463 | 734 | 1048 | 1419 | 1101 | 1571 | 2128 |
| | 2-3 | 1034 | 1390 | 1837 | 2451 | 360 | 540 | 1611 | 2142 | 2858 | 3818 | 407 | 610 | 814 | 1575 | 2130 | 1221 | 2363 | 3194 |
| | 4-7 | 1378 | 1849 | 2451 | 3264 | 443 | 664 | 2142 | 2858 | 3806 | 5074 | 505 | 759 | 896 | 2094 | 2832 | 1344 | 3142 | 4249 |
| 526-600 | 1 | 692 | 924 | 1230 | 1640 | 271 | 406 | 1209 | 1611 | 2142 | 2858 | 344 | 516 | 819 | 1168 | 1604 | 1230 | 1751 | 2405 |
| | 2-3 | 1034 | 1390 | 1837 | 2451 | 360 | 540 | 1812 | 2414 | 3214 | 4287 | 455 | 684 | 912 | 1761 | 2401 | 1368 | 2641 | 3600 |
| | 4-7 | 1378 | 1849 | 2451 | 3264 | 443 | 664 | 2414 | 3214 | 4287 | 5714 | 565 | 849 | 1002 | 2342 | 3203 | 1503 | 3514 | 4805 |
| 601-675 | 1 | 692 | 924 | 1230 | 1640 | 271 | 406 | 1343 | 1785 | 2389 | 3177 | 380 | 570 | 908 | 1293 | 1785 | 1363 | 1940 | 2678 |
| | 2-3 | 1034 | 1390 | 1837 | 2451 | 360 | 540 | 2019 | 2685 | 3583 | 4766 | 505 | 759 | 1010 | 1946 | 2685 | 1512 | 2920 | 4029 |
| | 4-7 | 1378 | 1849 | 2451 | 3264 | 443 | 664 | 2685 | 3583 | 4766 | 6352 | 626 | 940 | 1110 | 2589 | 3573 | 1667 | 3883 | 5358 |
| 676-750 | 1 | 692 | 924 | 1230 | 1640 | 271 | 406 | 1475 | 1969 | 2623 | 3498 | 420 | 631 | 997 | 1419 | 1969 | 1496 | 2128 | 2954 |
| | 2-3 | 1034 | 1390 | 1837 | 2451 | 360 | 540 | 2217 | 2953 | 3941 | 5247 | 556 | 835 | 1107 | 2130 | 2953 | 1661 | 3194 | 4428 |
| | 4-7 | 1378 | 1849 | 2451 | 3264 | 443 | 664 | 2953 | 3941 | 5247 | 6994 | 692 | 1037 | 1218 | 2832 | 3941 | 1827 | 4249 | 5912 |
| 751 & over | 1 | 692 | 924 | 1230 | 1640 | 271 | 406 | 1475 | 1969 | 2623 | 3498 | 455 | 684 | 1088 | 1539 | 2155 | 1631 | 2309 | 3232 |
| | 2-3 | 1034 | 1390 | 1837 | 2451 | 360 | 540 | 2217 | 2953 | 3941 | 5247 | 603 | 906 | 1209 | 2313 | 3241 | 1813 | 3470 | 4861 |
| | 4-7 | 1378 | 1849 | 2451 | 3264 | 443 | 664 | 2953 | 3941 | 5247 | 6994 | 753 | 1128 | 1329 | 3079 | 4311 | 1993 | 4619 | 6467 |

(A) "Seating Capacity" for ballrooms, dance clubs, discos and similar operations means the total allowable occupancy of the premises under local fire or similar regulations, and shall not be limited to the total number of available seats, provided that if no such local fire or similar regulations are in effect, then "seating capacity" means 10 people per 100 square feet or portion thereof of the room(s) in which music is performed.

(B) VARIABLES (Applicable to single instrumentalist):
- Show or act(s) or vocalist(s).
- Admission, minimum, cover, entertainment or similar charge.
- Alternate or relief music (live) by a single instrumentalist. Music provided solely at the time of the show or act(s) shall not be deemed to be alternate or relief music.

(C) "Mechanical Music Audio-Only" means performances other than by live musicians, e.g., records, tapes, compact discs, karaoke, or similar media or by a radio-over-loudspeaker system licensable under the United States Copyright Law, but shall not include music presented by means of a music-on-hold telephone system or a jukebox (as hereinafter defined).

(D) "Mechanical Music Audio-Visual" means performances such as, for example, by means of a television with screen measuring greater than 36 inches diagonally, multiple televisions regardless of screen size, laser discs, video tapes, karaoke with video, or video jukeboxes. If performances are presented by both audio-only and audio-visual mechanical means, add only the applicable additional fee specified for "mechanical music audio-visual."

(E) VARIABLES (Applicable to two or more instrumentalists):
- Show or act(s).
- Admission, minimum, cover, entertainment or similar charge.
- Alternate or relief music (live) by any instrumentalist(s). Music provided solely at the time of the show or act(s) shall not be deemed to be alternate or relief music.

(F) VARIABLES (Applicable when there is no live music, to audio-only and audio-visual mechanical music):
- Admission, minimum, cover, entertainment or similar charge.
- Dancing (patrons or performers), show or act(s) (including disc jockey, video jockey or master of ceremonies).

## FEE FOR PERFORMANCES BY MEANS OF JUKEBOX(ES)

For purposes of this Agreement, a "jukebox" is a machine or device that is (i) employed solely for the non-dramatic performance of musical works by means of phonorecords, compact discs or similar medium and which is activated by insertion of coins, currency, tokens, or other monetary units or their equivalent; (ii) is located in an establishment making no direct or indirect charge for admission; (iii) is accompanied by a list of the titles of all musical works available for performance on the jukebox, which list is affixed to the jukebox or posted in the establishment in a prominent position where it can be readily examined by the public; (iv) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located; and (v) for which neither a compulsory license nor a license from the Jukebox License Office nor a license from SOCIETY other than this license is in effect. For purposes of this Agreement, the term "jukebox" does not include devices commonly known as "video-jukeboxes," or any other audio-visual devices.

For performances given by means of jukebox(es), the annual license fee shall be $220 per jukebox.

## FEE FOR PERFORMANCES BY MEANS OF MUSIC-ON-HOLD TELEPHONE SYSTEM

For performances given by means of a music-on-hold telephone system at the premises, the annual license fee shall be $164.

## COMPUTATION OF FEE FOR MIXED POLICIES

1. Compute fee for the higher policy for the number of days/nights that the higher policy is in effect. The higher policy is the policy which generates the highest fee for any one day/night. If the higher policy is in effect for four or more days/nights per week, stop here: Your fee is the fee for the higher policy. If the higher policy is in effect for fewer than four days/nights per week, continue with steps 2 through 6 below to complete the computation of the fee for your mixed policy.
2. Note total number of days/nights entertainment is provided.
3. Compute fee for the lower policy using the total number of days/nights entertainment is provided under both the higher and lower policies.
4. Compute fee for the lower policy using the number of days/nights the higher policy is in effect.
5. Subtract fee computed in step 4 from fee computed in step 3.
6. Add fee computed in step 1 to fee computed in step 5 for total fee.

## SEASONAL FEES

For seasonal licensees, the fees for periods up to four months of operation are 1/2 the annual license fee; for each additional month the fee is 1/12 the annual license fee. The seasonal license fee will in no case be more than the annual license fee.

## FEE FOR OCCASIONAL PERFORMANCES

For policies in effect for any three or fewer days/nights per month, the fee is the applicable annual fee for the highest of such policies as if such highest policy were in effect for one day/night per week. For policies in effect for any six or fewer days/nights per calendar year, the fee is 1/3 the applicable annual fee for the highest of such policies as if such highest policy were in effect for one day/night per week.

## ANNUAL LICENSE FEE FOR CALENDAR YEARS 1997 AND THEREAFTER

The annual license fee for each calendar year commencing 1997 shall be the license fee for the preceding calendar year, adjusted in accordance with the increase in the Consumer Price Index (National, All Items) between the preceding October and the next preceding October.

THE MARYLAND JOCKEY CLUB
P.O. Box 130
Laurel, Maryland 20725

May 6, 1996

VIA FACSIMILE

The Honorable Jan Meyers
Chairwoman
House Committee on Small Businesses
2361 Rayburn House Office Building
Washington, DC 20515

The Honorable John LaFalce
House Committee on Small Businesses
2310 Rayburn House Office Building
Washington, DC 20515

Re: Music Licensing

Dear Representatives Meyers and LaFalce:

The Maryland Jockey Club operates Laurel Park and Pimlico Race Course, the Maryland Thoroughbred Racetracks. It is effected by the television background music issue and the economic unfeasibility of contesting inequitable music licensing rates.

The Tracks ceased daily music broadcasts in 1992 because the minimal musical use was disproportionate to per diem rates demanded by Licensing Societies. Music was played in the mornings for employees and stopped one hour before post time before most patrons arrived. The bulk of our attendance arrives after the second or third races. Licensing Societies maintained early arriving patrons might hear copyrighted music therefore full per diem royalties were owed. They rejected an offer to pay a percentage of the daily rate proportionate to the amount of time music was played.

Next came the demand for full per diem rates for "television background music." The Tracks' dining rooms and box seats have television monitors pre-tuned to closed circuit racing from Maryland and other states. The televisions can access commercial television if the patron changes channels but the televisions are pre-tuned to racing. Commercial television access accommodates weekend patrons who do not want to miss the weekend basketball, baseball and football.

The Licensing Societies theorize that a dining room or box seat patron might access commercial television and hear copyrighted music played in the background of a program or commercial. For this they demand full per diem rates. An offer to pay an adjusted per diem rate proportionate to the dining room and box seat attendance was rejected. A very small percentage of racetrack attendance uses dining rooms and box seats. The Tracks' remedy was to litigate a rate case in New York Federal Court under a consent decree pending in that jurisdiction.

Charging full per diem rates for television background music is inequitable. No one patronizes box seats and dining rooms to hear background music. It is valueless. No one would pay to hear it. It is a minuscule component of a television broadcast for which the performing artist was fairly compensated by the broadcaster so the artist received an appropriate value for the work. Licensing Societies want a second payment for works already sold to television broadcasters for distribution to the public at large.

A minority of patrons utilize the dining room and box seats. A small minority of that minority change stations. A smaller minority of that minority, if any, pay attention to background music. Most patrons watch the races. Television background music is most frequently played at the beginning or end of stations breaks and in commercials. Patrons frequently use the time when the background music is playing to handicap, place or cash a bet or leave their seat for refreshments or the restroom.

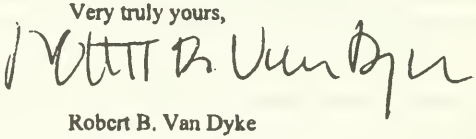
A secondary inequity is that the remedy for inequitable rate demands is to litigate a rate case in New York Federal District Court at a cost that exceeds the desired rate reduction. A rate case requires travel to New York, hotel accommodations for the company representative and witnesses, and retaining a member of the New York bar admitted to Federal Court. The expense of the "means" is equivalent to or exceeds the potential "ends."

A rational solution for rate disputes is arbitration through a local office of the American Arbitration Association. AAA maintains conveniently located offices throughout the United States with panels of arbitrators that serve several states in their region. AAA is extensively used in the commercial, labor and construction fields for a prompt, cost effective resolution.

MJC and its union, the United Food & Commercial Workers Union, Local 27 use AAA two to three times a year for collective bargaining agreement disputes they cannot resolve. It usually takes ½ day. The parties pick an arbitrator from a seven to eight member panel. The arbitrator comes to the Track and is presented with concise positions by each side. The arbitrator usually pronounces a "judgment of Solomon." I have agreed and disagreed with various results but in all cases the decision is acceptable and above all, more cost effective and expedient than Federal District Court litigation.

Thank you for your consideration. I hope these comments illuminate the practical effect of these issues. MJC respectfully urges the House to ameliorate the inequities of Television Background Music royalty fees and New York Federal District Court litigation to resolve rate disputes.

Very truly yours,



Robert B. Van Dyke
Assistant General Counsel

104TH CONGRESS
1ST SESSION

# H. R. 789

To amend title 17, United States Code, with respect to the licensing of music, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 1, 1995

Mr. SENSENBRENNER introduced the following bill; which was referred to the Committee on the Judiciary

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# A BILL

To amend title 17, United States Code, with respect to the licensing of music, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Fairness in Musical Licensing Act of 1995".

**SEC. 2. BUSINESS EXEMPTION.**

Section 110(5) of title 17, United States Code, is amended to read as follows:

"(5) communication by electronic device of a transmission embodying a performance or display of

a work by the reception of a broadcast, cable, satellite, or other transmission, unless—

"(A) an admission fee is charged specifically to see or hear the transmission, or

"(B) the transmission is not properly licensed,

except that this paragraph shall apply in the case of a performance or display in a commercial establishment only if the performance or display is incidental to the main purpose of the establishment;".

**SEC. 3. BINDING ARBITRATION OF RATE DISPUTES INVOLVING PERFORMING RIGHTS SOCIETIES.**

(a) IN GENERAL.—Section 504 of title 17, United States Code, is amended by adding at the end the following new subsection:

"(d) PERFORMING RIGHTS SOCIETIES; BINDING ARBITRATION.—

"(1) ARBITRATION OF DISPUTES PRIOR TO COURT ACTION.—

"(A) ARBITRATION.—(i) If a general music user and a performing rights society are unable to agree on the appropriate fee to be paid for the user's past or future performance of musical works in the repertoire of the performing rights society, the general music user shall, in

lieu of any other dispute-resolution mechanism established by any judgment or decree governing the operation of the performing rights society, be entitled to binding arbitration of such disagreement pursuant to the rules of the American Arbitration Association. The music user may initiate such arbitration.

"(ii) The arbitrator in such binding arbitration shall determine a fair and reasonable fee for the general music user's past and future performance of musical works in such society's repertoire and shall determine whether the user's past performances of such musical works, if any, infringed the copyrights of works in the society's repertoire. If the arbitrator determines that the general music user's past performances of such musical works infringed the copyrights of works in the society's repertoire, the arbitrator shall impose a penalty for such infringement. Such penalty shall not exceed the arbitrator's determination of the fair and reasonable license fee for the performances at issue.

"(B) DEFINITION.—For purposes of this paragraph, a 'general music user' is any person who performs musical works publicly but is not

engaged in the transmission of musical works to the general public or to subscribers through broadcast, cable, satellite, or other transmission. For purposes of this paragraph, transmissions within a single commercial establishment or within establishments under common ownership or control are not transmissions to the general public.

"(C) ENFORCEMENT OF ARBITRATOR'S DETERMINATIONS.—An arbitrator's determination under this paragraph is binding on the parties and may be enforced pursuant to sections 9 through 13 of title 9.

"(2) COURT-ANNEXED ARBITRATION.—In any civil action for infringement of the right granted in section 106(4) involving a musical work that is in the repertoire of a performing rights society, if the defendant admits the prior public performance of one or more works in the repertoire of the performing rights society but contests the amount of the license fee demanded by such society for such performance, the dispute shall, if requested by the defendant, be submitted to arbitration under section 652(e) of title 28. In such arbitration proceeding, the arbitrator shall determine the amount owed by

the defendant to the performing rights society for all past public performances of musical works in the society's repertoire. Such amount shall not exceed two times the amount of the blanket license fee that would be applied by the society to the defendant for the year or years in which the performances occurred. In addition, the arbitrator shall, if requested by the defendant, determine a fair and reasonable license fee for the defendant's future public performances of the musical works in such society's repertoire.

"(3) TERM OF LICENSE FEE DETERMINATION.—In any arbitration proceeding initiated under this subsection, the arbitrator's determination of a fair and reasonable license fee for the performance of the music in the repertoire of the performing rights society concerned shall apply for a period of not less than 3 years nor more than 5 years after the date of the arbitrator's determination.".

(b) ACTIONS THAT SHALL BE REFERRED TO ARBITRATION.—Section 652 of title 28, United States Code, is amended by adding at the end the following:

"(e) ACTIONS THAT SHALL BE REFERRED TO ARBITRATION.—In any civil action for infringement of the right granted in section 106(4) of title 17 involving a mu-

sical work that is in the repertoire of a performing rights society, if the defendant admits the public performance of any musical work in the repertoire of the performing rights society but contests the amount of the license fee demanded for such performance by the society, the district court shall, if requested by the defendant, refer the dispute to arbitration, which shall be conducted in accordance with section 504(d)(2) of title 17. Each district court shall establish procedures by local rule authorizing the use of arbitration under this subsection. The definitions set forth in title 17 apply to the terms used in this subsection.".

**SEC. 4. RADIO PER PROGRAMMING PERIOD LICENSE.**

Section 504 of title 17, United States Code, as amended by section 3 of this Act, is further amended by adding at the end thereof the following new subsection:

"(e) RADIO PER PROGRAMMING PERIOD LICENSES.—

"(1) IN GENERAL.—Each performing rights society shall offer, to any radio broadcaster that so requests, a per programming period license to perform nondramatic musical works in the repertoire of the performing rights society. Such license shall be offered on reasonable terms and conditions that provide an economically and administratively viable al-

ternative to the society's blanket license for all such broadcasters.

"(2) PRICE OF PER PROGRAMMING PERIOD LICENSES.—(A) The total price of a per programming period license described in paragraph (1)—

"(i) shall include separate components for incidental and feature performances, which are independent of the quantity of such performances by the broadcaster and do not exceed the relative value the performing rights society assigns to such performances in its distribution of royalties; and

"(ii) shall not exceed the fee that would be payable by the broadcaster under the lowest price blanket license offered to radio broadcasters, and shall be in direct proportion to the percentage of the broadcaster's revenue attributable to programming periods containing feature performances of musical works in the society's repertoire compared to the industry average percentage of revenue attributable to programming periods containing feature performances of musical works in the society's repertoire.

"(B) Nondramatic musical works that have been licensed directly or at the source, or whose performance constitutes fair use or is otherwise exempt from liability under this title, shall not be considered in calculating any per programming period license fee under this subsection.

"(3) ADMINISTRATION OF LICENSE.—Beginning January 1, 1998, the performance of nondramatic musical works by a broadcaster under any per programming period license shall be determined on the basis of statistically reliable sampling or monitoring by the performing rights society, and the society may not require the broadcaster to report such performance to the society. The society shall provide the broadcaster with a report detailing the results of such sampling or monitoring, identifying each programming period containing the performance of nondramatic musical works in the society's repertoire and the nondramatic musical works performed.

"(4) IMPLEMENTATION.—Any radio broadcaster entitled to a per programming period license under this subsection may bring an action to require compliance with this subsection in an appropriate United States district court, including any district

court established by court order or statute as a court that resolves disputes, with respect to license rates, that may arise between performing rights societies and persons who perform musical works in the society's repertoire.

"(5) DEFINITIONS.—As used in this subsection—

"(A) the term 'blanket license' means a license provided by a performing rights society that authorizes the unlimited performance of musical works in the society's repertoire, for a fee that does not vary with the quantity or type of performances of musical works in the society's repertoire;

"(B) the term 'incidental' means commercial jingles not exceeding 60 seconds in duration, bridges, themes or signatures, arrangements of works in the public domain, and background music, including music used in conjunction with sporting events; and

"(C) the term 'programming period' means any 15-minute period of radio broadcasting commencing on the hour, or at 15, 30, or 45 minutes past the hour.".

**SEC. 5. ACCESS TO REPERTOIRE AND LICENSING INFORMATION.**

Section 504 of title 17, United States Code, as amended by sections 3 and 4 of this Act, is further amended by adding at the end the following:

"(f) ACCESS TO MUSICAL REPERTOIRE.—

"(1) ONLINE COMPUTER ACCESS.—Each performing rights society shall make available, free of charge, to all interested persons, online computer access to copyright and licensing information for each work in its repertoire. Such access shall, for each such musical work, identify the work by title of the work, the name, address, and telephone number of both the author and the copyright owner, when the work will enter the public domain, and the names of any artists known to have performed the work. Such online computer access shall permit the efficient review of multiple musical works consistent with reasonably available technology.

"(2) DIRECTORY OF TITLES.—Each performing rights society shall make available at no charge, not less frequently than semiannually, a printed directory of each title in its repertoire, as of the date which is not more than 30 days before the date on which the directory is published, containing the information set forth in paragraph (1).

"(3) DOCUMENTATION OF RIGHT TO LICENSE.—A performing rights society shall, upon the request of any person who performs or may perform musical works in the society's repertoire, provide to that person copies of the documentation establishing the society's right to license the public performance of such musical works.

"(4) RESTRICTIONS ON INFRINGEMENT ACTIONS.—

"(A) RESTRICTIONS.—A performing rights society may not institute or be a party to, or pay the costs of another party in, any action alleging the infringement of the copyright in, or charge a fee under any per programming period license for, any work in that society's repertoire that is not identified and documented as required by paragraphs (1), (2), and (3).

"(B) EXCEPTION.—Subparagraph (A) shall not apply on the basis of a failure to comply with paragraph (2) with respect to a musical work first entering the society's repertoire within the 6-month period beginning 30 days before the date on which the society's last directory was published under paragraph (2), if the society establishes that such musical work was

included in the online database required by paragraph (1) not less than 10 days before the performance giving rise to the alleged infringement or charge.

"(g) ACCESS TO LICENSING INFORMATION.—

"(1) TERMS OF LICENSES.—Each performing rights society shall provide, within 5 business days after it receives a written request from a licensee of any musical work in the society's repertoire, or from any person that is negotiating to become such a licensee—

"(A) a schedule of the society's license rates for those licensees in the same locality as the licensee or person making the request, that have characteristics similar to such licensee or person, except that the society shall provide information with respect to at least 5 but not more than 10 such licensees;

"(B) the formulas by which the rates are derived; and

"(C) license terms under agreements executed by the performing rights society and licensees described in subparagraph (A).

"(2) COPIES OF LICENSES.—Each performing rights society shall provide, within 5 business days

after receiving a written request from an entity authorized to negotiate license fees and terms on behalf of any group of persons who perform or may perform musical works within that society's repertoire, copies of all forms of licenses negotiated between that society and other entities authorized to negotiate license fees and terms on behalf of any group of persons who perform musical works in that society's repertoire, except that the society shall not disclose individual licensee's names, addresses, or business confidential information.".

**SEC. 6. ANNUAL REPORTS.**

Not later than March 1 of each year, the Attorney General of the United States shall submit a written report to the Congress on the activities of the Department of Justice during the preceding calendar year relating to the continuing supervision and enforcement by the Department of the consent decree of the American Society of Composers, Authors, and Publishers of March 14, 1950, and the consent decree of Broadcast Music, Inc. of December 29, 1966. Such report shall include a description of all issues raised or complaints filed with the Department of Justice relating to the operations of those performing rights societies, and a summary of the Department's ac-

tions or investigations undertaken by the Department in response to such issues and complaints.

**SEC. 7. VICARIOUS LIABILITY PROHIBITED.**

A landlord, an organizer or sponsor of a convention, exposition, or meeting, a facility owner, or any other person making space available to another party by contract, shall not be liable under any theory of vicarious or contributory infringement with respect to an infringing public performance of a copyrighted work by a tenant, lessee, subtenant, sublessee, licensee, exhibitor, or other user of such space on the ground that—

(1) a contract for such space provides the landlord, organizer or sponsor, facility owner, or other person a right or ability to control such space and compensation for the use of such space; or

(2) the landlord, organizer or sponsor, facility owner, or other person has or had at the time of the infringing performance actual control over some aspects of the use of such space,

if the contract for the use of such space prohibits infringing public performances and the landlord, organizer or sponsor, facility owner, or other person does not exercise control over the selection of works performed.

**SEC. 8. RELIGIOUS SERVICE EXEMPTION.**

Section 110(3) of title 17, United States Code, is amended by inserting after "religious assembly" the following: ", the transmission of such services, whether live or recorded, or the recording of copies or phonorecords of a transmission program embodying such services in their entirety".

**SEC. 9. CONFORMING AMENDMENTS.**

(a) DEFINITIONS.—Section 101 of title 17, United States Code, is amended by inserting after the undesignated paragraph relating to the definition of "perform" the following:

> "A 'performing rights society' is an association, corporation, or other entity that licenses the public performance of nondramatical musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors, and Publishers, Broadcast Music, Inc., and SESAC, Inc. The 'repertoire' of a performing rights society consists of those works for which the society provides licenses on behalf of the owners of copyright in the works.".

**SEC. 10. CONSTRUCTION OF ACT.**

Except as provided in section 504(d)(1) of title 17, United States Code, as added by section 3(a) of this Act, nothing in this Act shall be construed to relieve any performing rights society (as defined in section 101 of title

17, United States Code) of any obligation under any consent decree or other court order governing its operation, as such decree or order is in effect on the date of the enactment of this Act, as it may be amended after such date, or as it may be issued or agreed to after such date.

**NFIB**
National Federation of
Independent Business

May 6, 1996

The Honorable Jan Meyers
Chairwoman - House Small Business Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chairwoman Meyers:

On behalf of the more than 600,000 members of the National Federation of Independent Business (NFIB), I am writing in support of H.R. 789, **The Fairness in Musical Licensing Act of 1995**, introduced by Representative James Sensenbrenner.

The time has come for fairness in musical licensing. Under current licensing agreements, organizations like ASCAP, BMI, and SESAC are allowed to make small businesses pay two, three, maybe four times for music aired on radio or television in public spaces, not to mention compact discs and cassettes. In the case of radio and television, broadcasters have **already** paid sizable royalty payments to ASCAP and BMI, who represent the artist, to transmit this music.

More troubling is the fact that such licensing fees are arbitrarily levied by the music societies and small business owners have virtually no recourse in disputing such rates. One court in New York City is the only place a small business owner can turn if they believe they were treated unfairly by ASCAP or BMI. This is hardly a system fair to small businesses outside of New York City.

H.R. 789 constitutes much-needed basic consumer protection that would relieve onerous, expensive, and unnecessary burdens imposed by the current system on small business. More specifically, this legislation clarifies the law by creating an exemption from the payment of royalties to these music societies for incidental music which is rebroadcast over radio and TV, ensures price equity, and provides for local arbitration to resolve licensing disagreements.

NFIB members by *an overwhelming ninety-two percent have demanded music licensing reform legislation* because of the unfairness and injustice in the current system. NFIB members strongly support H.R. 789. We urge you to respond to the calls for fairness from small businesses in your state by supporting this legislation. We look forward to working with you.

Sincerely,

John Satterfield
Vice President
Federal Governmental Relations

600 Maryland Ave. SW, Suite 700 • Washington, DC 20024 • 202 554 9000 • Fax 202 554 0496

NATIONAL RETAIL FEDERATION

May 7, 1996

The Honorable Jan Meyers
Chair, House Small Business Committee
2361 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairwoman Meyers:

On behalf of the National Retail Federation and the 1.4 million U.S. retail establishments we represent, I would like to express our appreciation to the House Small Business Committee for conducting hearings on the most important issue of music licensing. Small retail companies have long sought relief from the arbitrary pricing, discriminatory enforcement and abusive collection practices of music licensing organizations.

Small retail companies are continuously confronted by costly and unreasonable demands from music licensing organizations. These organizations have monopoly power to set rates and, therefore, retailers are frequently asked to pay outrageous and unfair licensing fees to play music which is only incidental to the purpose of their business.

Of particular concern is the practice of "double dipping" by music licensing organizations which collect millions of dollars in fees from radio and television broadcasters who pay for the rights to air music, and then use heavy handed tactics to collect a second time from businesses that air such broadcasts. If retailers express concerns about paying these fees, which are arbitrarily set, they are often threatened with lawsuits. The only recourse currently available to retailers in fighting these tactics of the music licensing organizations is to file a costly lawsuit in the federal court for the South District of New York, the single federal court authorized to handle such disputes.

The National Retail Federation strongly supports legislation introduced by Congressman Jim Sensenbrenner (R-WI), H.R. 789, that would extend current law to exempt radio or television music from licensing fees as long as the music was purely background or incidental to the main purpose of the business and customers were not charged a fee to listen to the music. This would put an end to the practice by music licensers of collecting exorbitant fees from television and radio stations, and then collecting again from the businesses that carry their broadcasts. The legislation is a modest attempt to level the playing field and bring some fairness into the activities of the music licensing organizations.

*The World's Largest Retail Trade Association*

◆

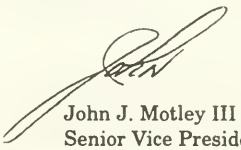
Liberty Place, 325 7th Street NW, Suite 1000
Washington, DC 20004
202.783.7971 Fax 202.737 2849

As the Committee is aware, there have been several direct negotiations between the music licensing organizations and concerned business groups. While the negotiations have yielded some further understanding of the problems associated with music licensing, the retail industry continues to have difficulties with discussions that would allow an exemption from licensing for small businesses based on square footage requirements and the number of speakers located in an establishment. The retail community is extremely diverse and ranges in size from furniture stores, with expansive showrooms, to some specialty shops doing business in a shopping mall corridor. To base an exemption for small businesses based on a square footage requirement of 1500 square feet for retail establishments, as proposed by the music licensers, would allow less than one tenth of NRF's small store membership to take advantage of the exemption. This is unacceptable because it provides no relief for many truly small retailers.

Small retail companies across the nation struggle from day to day and make painful decisions on how to reduce expenses in order to survive in today's extremely competitive marketplace. Those decisions should not be made even more difficult or painful by allowing music licensing monopolies to continue to unfairly collect millions of dollars from small businesses. Again, we appreciate the Committee's efforts in examining this extremely important issue.

By way of background, the National Retail Federation is the world's largest retail trade association with membership that includes the leading department, specialty, discount, mass merchandise and independent stores, as well as 32 national and 50 state associations. NRF members represent an industry that encompasses over 1.4 million U.S. retail establishments, employs nearly 20 million people, 1 in 5 American workers, and registered 1994 sales of more than of $2.2 trillion. NRF's international members operate stores in more than 50 nations.

Sincerely,



John J. Motley III
Senior Vice President
Government & Public Affairs

Michael B. Salzman (MS-6485)
Hughes Hubbard & Reed
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - - -x
:
UNITED STATES OF AMERICA,
:
Plaintiff,
:
-against- 64 Civ. 3787
:
BROADCAST MUSIC, INC., et al.,
:
Defendants.
:
- - - - - - - - - - - - - - - - - - - - - - - -x

STIPULATION

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

1. In lieu of the proposed order attached to the stipulation between the parties dated June 28, 1994, an order in the form attached hereto as Exhibit A modifying the Consent Judgment entered herein against BMI on December 29, 1966, may be entered and filed by the Court, sua sponte and without any further notice to any party, at any time after November 15, 1994, provided that defendant has not withdrawn its motion, which it may do at any time before entry of an order with respect thereto, by filing notice thereof with the Court and serving a copy of said notice upon plaintiff, and provided further that plaintiff

has not withdrawn its consent as to all but the modification to Article XIII of the Consent Decree or its position of neutrality with respect to the modification to Article XIII of the Consent Decree set forth in the proposed order, which it may do at any time before the entry of an order granting the relief requested by the movant, by filing notice of the withdrawal of its consent and/or position of neutrality with the Court and serving a copy of said notice upon BMI.

2. In the event plaintiff withdraws its consent and/or position of neutrality, or if BMI withdraws its motion, or if the proposed order granting the relief proposed by the movant is not entered pursuant to this Stipulation, this Stipulation shall be of no effect whatever, the making of it shall be without prejudice to any party in this or any other proceedings, and it shall not thereafter be used in this or any other action, or for any other purpose.

Dated: November ~~October~~ 4, 1994

FOR THE PLAINTIFF
UNITED STATES OF AMERICA

James J. Tierney (JT-7842)
Attorney for the United States
Antitrust Division
United States Department of Justice
Room 9907
555 4th Street, N.W.
Washington, D.C. 20001
(202) 307-0797

FOR THE DEFENDANT
BROADCAST MUSIC, INC.

Michael E. Salzman (MS-6485)
Hughes Hubbard & Reed
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff, -against- BROADCAST MUSIC, INC., et al., Defendants. | 64 Civ. 3787 |

ORDER MODIFYING THE 1966 CONSENT DECREE HEREIN

Defendant Broadcast Music, Inc. ("BMI") having moved this Court for an order modifying the Consent Decree entered herein against BMI on December 29, 1966, and notice of the motion having been published in two consecutive issues of the national edition of The Wall Street Journal, two consecutive issues of Broadcasting & Cable, and two consecutive issues of the weekly edition of Variety, and proof filed of such publication having been filed with the Court; and all interested persons having been given an opportunity to submit comments concerning the proposed modifications and plaintiff, the United States of America, having consented to all but the proposed modification of Article XIII thereof, as to which it is neutral, and the Court having considered all the papers that have been filed in connection with the motion, and the Court finding that it is in the public interest to grant the motion, it is

ORDERED, ADJUDGED and DECREED that the 1966 Consent Decree be and hereby is modified as follows:

I. Add the following new Article XIV:

(A) Subject to all provisions of this Final Judgment, defendant shall, within ninety (90) days of its receipt of a written application from an applicant for a license for the right of public performance of any, some or all of the compositions in defendant's repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when defendant advises the applicant of the fee which it deems reasonable, the applicant may forthwith apply to this Court for the determination of a reasonable fee and defendant shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Assistant Attorney General in charge of the Antitrust Division. If the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when defendant advises the applicant of the fee which it deems reasonable and no such filing by applicant for the determination of a reasonable fee for the license requested is pending, then defendant may forthwith apply to this Court for the determination of a reasonable fee and defendant shall promptly give notice of its filing of such application to the Assistant Attorney General in charge of the Antitrust Division. In any such proceeding, defendant shall have the burden of proof to establish the reasonableness of the fee requested by it. Should defendant not establish that the fee requested by it is a reasonable one, then the Court shall determine a reasonable fee based upon all the evidence. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in defendant's repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in defendant's repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or

defendant may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. It is the purpose of this provision that an interim fee be determined promptly, and without prejudice as to the final determination of what constitutes a reasonable fee. It is further intended that interim fee proceedings be completed within 120 days of the date when application is made to fix an interim fee, subject to extension at the request of defendant or the applicant only in the interest of justice for good cause shown. If the Court fixes such interim fee, defendant shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date the applicant requested a license. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of its application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant requested a license;

(C) When a reasonable fee has been finally determined by this Court, defendant shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of defendant, but any license agreement which has been executed without any Court determination between defendant and another applicant similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Article XIV shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in defendant's repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

II. Add to Article II the following subsection:

(B) "Defendant's repertory" means those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense.

III. Amend Article VII(C) to read as follows (adding the underscored section to the already existing language):

Defendant shall include in all contracts which it tenders to writers, publishers and music users relating to the licensing of performance rights a clause requiring the parties to submit to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association, all disputes of any kind, nature or description in connection with the terms and conditions of such contracts or arising out of the performance thereof or based upon an alleged breach thereof, except that in all contracts tendered by defendant to music users, the clause requiring the parties to submit to arbitration will exclude disputes that are cognizable by the Court pursuant to Article XIV hereof.

IV. Amend Article IX(A) to read as follows (adding the underscored section to the already existing language):

Defendant shall not license the public performance of any musical composition except on a basis whereby, insofar as network broadcasting by a regularly constituted network so requesting is concerned, the issuance of a single license, authorizing the fixing of a single license fee for such performance by network broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

V. Add to Article XIII the following language at the end thereof:

To best preserve the independent conduct of defendant's music licensing activities, the jurisdiction retained by this Court over this Final Judgment shall be exercised by a Judge of this Court other than one to whom has been assigned any action in which a judgment has been entered retaining jurisdiction over any music performing rights licensing organization other than defendant. No reference or assignment of any issue or matter under this Final Judgment shall be made to a Magistrate Judge or Master to whom has been referred or assigned any pending issue or matter in which any music performing rights licensing organization other than defendant is a party.

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that with respect to any music user heretofore licensed by defendant the license agreement of which expressly provides for determination by this Court of reasonable license fees or other terms for any period covered by such license, either defendant or such music user may apply to this Court for such determination provided that such license agreement provision has not otherwise expired.

Dated: New York, New York
_____, 1994

_____
U.S.D.J.

***Greater Southern Country Music Assn.***
**Office of the Representative-at-Large**
**6104 Chimney Rock**
**Killeen, TX 76542**

Hon. Jan Meyers-Chmn
House Small Business Committee
Washington, D.C. 20515

Dear Congresswoman Meyers: May 2, 1996

G.S.C.M.A. represents over 2000 member/songwriters/recording artists/publishers and over 800 radio stations, both Country and Gospel/Christian/Religious in the United States and Europe. As the Rep. at Large, I am writing on behalf of our members to support the investigations against ASCAP and the allegations of the National Restaurant Association and the Religious Broadcasters Association.

Many of our members are also ASCAP members as songwriters and/or publishers. Our members' records are distributed to our member radio stations who return monthly or weekly playlists to our magazine office in Florida to be compiled into our monthly charts in Country and Christian music for both the USA and Europe. In all, there are those four charts in each magazine, published monthly or bi-monthly for the past eight years.

Our members are also performers in restaurants, clubs, hotels, resorts, and churches in both the USA and Europe. Hence, our affiliation with the National Restaurant Association and the Religious Broadcasters.

What we wish to show to the committee is that as both ASCAP members and songwriters/publishers/artists/composers; we <u>are</u> supposed to be receiving the royalties that ASCAP so diligently collects from the restaurants and radio stations-**<u>But we don't get any money at all!</u>**

ASCAP collects these royalties under the false pretenses that they are fairly distributing these moneys to us-the writers and publishers whose works are being performed. They sign us up as members under the outright fraud that they will collect our royalties and distribute them to us. In fact, ASCAP does neither. There is a clique in Tin Pan Alley, Nashville, and L.A. that gets the lion's share of the funds, while our members get totally defrauded.

Last year, I had as many as nine songs listed on the G.S.C.M.A. charts at one time, and two on the Europe and USA charts for 15 and 21 months each. My ASCAP checks? **<u>Zero!</u>** My publisher, with over 4000 gold records, several dozen artists, and consistently at least 20 people on the charts at each issue? His ASCAP checks-**<u>Zero!</u>** Why? Only a small fraction of the FCC licensed radio stations are surveyed by ASCAP. They refuse to survey our member stations or the Restaurants to see what they are playing, so that they can keep the moneys collected in the hands of their inside clique. After 1995's Congressional action, they sent all members the attached 'Member Extension Agreement' requiring us to rubber-stamp the fraud or lose our membership.

I filed complaints with FBI offices in both Austin, Texas and New York City. Both offices consulted with the local US Attorney's offices and refused to investigate ASCAP. You don't suppose there was too much pay-ola going on, do you? I complained to Janet Reno's office. Her letter is on file in Cong. Chet Edward's Belton, Texas with my spring 1995 detailed complaint in this matter. Janet Reno refused to investigate **the largest annual monetary fraud in the History of the United States-ASCAP!** There own member financial statements reveals that they took in 1/3 of a billion dollars annually from the US alone! Small wonder that they can afford a huge highrise in New York City,LA, and Nashville, and to openly buy US attorneys, Federal Judges in the Southern District of New York, and the FBI.

On behalf of our GSCMA members, please take this fraud and conspiracy to commit fraud totally out of business. Please stop the Congressional sponsorship of this fraud. Quit looking the other way, as Congress has for the past five decades, and re-invent this wheel. It's totally corrupt and decades beyond repair.

May I remind you that I am also a state delegate to the party convention, and that it is an election year.

Your prompt action is required.

Sincerely,

Dennis D. Sowell

### CROSS REFERENCES

Semiconductor chip product protection provisions not affecting rights or remedies under this chapter, see 17 USCA § 912.

### LIBRARY REFERENCES

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## § 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building,

architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

A work is a "Berne Convention work" if—

(1) in the case of an unpublished work, one or more of the authors is a national of a nation adhering to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a nation adhering to the Berne Convention on the date of first publication;

(2) the work was first published in a nation adhering to the Berne Convention, or was simultaneously first published in a nation adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention;

(3) in the case of an audiovisual work—

(A) if one or more of the authors is a legal entity, that author has its headquarters in a nation adhering to the Berne Convention; or

(B) if one or more of the authors is an individual, that author is domiciled, or has his or her habitual residence in, a nation adhering to the Berne Convention;

(4) in the case of a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, the building or structure is located in a nation adhering to the Berne Convention; or

(5) in the case of an architectural work embodied in a building, such building is erected in a country adhering to the Berne Convention.

For purposes of paragraph (1), an author who is domiciled in or has his or her habitual residence in, a nation adhering to the Berne Convention is considered to be a national of that nation. For purposes of paragraph (2), a work is considered to have been simultaneously published in two or more nations if its dates of publication are within 30 days of one another.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

The "country of origin" of a Berne Convention work, for purposes of section 411, is the United States if—

(1) in the case of a published work, the work is first published—

(A) in the United States;

(B) simultaneously in the United States and another nation or nations adhering to the Berne Convention, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that does not adhere to the Berne Convention; or

(D) in a foreign nation that does not adhere to the Berne Convention, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

For the purposes of section 411, the "country of origin" of any other Berne Convention work is not the United States.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the

other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

(Pub.L. 94–553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2541; Pub.L. 96–517, § 10(a), Dec. 12, 1980, 94 Stat. 3028; Pub.L. 100–568, § 4(a)(1), Oct. 31, 1988, 102 Stat. 2854; Pub.L. 101–650, Title VI, § 602, Title VII, § 702, Dec. 1, 1990, 104 Stat. 5128, 5133; Pub.L. 102–307, Title I, § 102(b)(2), June 26, 1992, 106 Stat. 266; Pub.L. 102–563, § 3(b), Oct. 28, 1992, 106 Stat. 4248.)

## HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**

**1976 Acts.** The significant definitions in this section will be mentioned or summarized in connection with the provisions to which they are most relevant. House Report No. 94–1476.

**1980 Acts.** House Report No. 96–1307(Parts I and II), see 1980 U.S. Code Cong. and Adm. News, p. 6460.

**1988 Acts.** Senate Report No. 100–352, see 1988 U.S. Code Cong. and Adm. News, p. 3706.

**1990 Acts.** Senate Report No. 101–416, House Report Nos. 101–123, 101–512, 101–514, 101–734, and 101–735, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 6802.

**1992 Acts.** House Report Nos. 102–379 and 102–196, see 1992 U.S. Code Cong. and Adm. News, p. 166.

House Report No. 102–873(Parts I and II) and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 3578.

**Amendments**

**1992 Amendments.** Pub.L. 102–563, § 3(b), substituted "Except as otherwise provided in this title, as" for "As" in introductory provisions.

Pub.L. 102–307, § 102(b)(2), added definition of "Registration".

**1990 Amendments.** Pub.L. 101–650, § 702(a), inserted, after paragraph defining an "anonymous work", definition of "architectural work".

Pub.L. 101–650, § 702(b), added, to definition of "Berne Convention work", par. (5).

Pub.L. 101–650, § 602, inserted, after paragraph defining a "widow", definition of term "work of visual art".

**1988 Amendments.** Pub.L. 100–568, § 4(a)(1)(B), added definition of terms "The Berne Convention" and "A work is a Berne Convention work" following definition of "Audiovisual works".

Pub.L. 100–568, § 4(a)(1)(C) added definition of term "country of origin" following definition of "Copyright owner".

Pub.L. 100–568, § 4(a)(1)(A), extended definition of term "Pictorial, graphic, and sculptural works", substituting in the first sentence "diagrams, models, and technical drawings, including architectural plans" for "technical drawings, diagrams, and models".

**1980 Amendments.** Pub.L. 96–517 added definition of term "computer program".

**Effective Dates**

**1992 Acts.** Amendment by section 3(b) of Pub.L. 102–563 effective on Oct. 28, 1992, see section 4 of Pub.L. 102–563, set out as a note under section 1001 of this title.

Section 102(g) of Pub.L. 102–307 provided that:

"(1) Subject to paragraphs (2) and (3), this section and the amendments made by this section [amending this section and sections 304, 408, 409, and 708 of this

Cross, C.A.11 (Ga.) 1986, 803 F.2d 638, 231 U.S.P.Q. 730, rehearing denied.

20. Injunctions—Generally

Computer software manufacturers which proved that software rental business rented particular copies of software in violation of the Computer Software Rental Amendments Act and that there was reason to believe that such conduct would continue were entitled to permanent injunctive relief. Central Point Software, Inc. v. Global Software & Accessories, Inc., E.D.N.Y.1995, 880 F.Supp. 957, 34 U.S.P.Q.2d 1627, as amended on denial of motion for new trial.

21. —— Preliminary injunctions

Computer software manufacturers were not entitled to preliminary injunction, against alleged violations of Computer Software Rental Amendments Act of 1990 by seller and renter of computer hardware, software, and accessories; manufacturers unreasonably delayed for over two years in bringing motion, undercutting any claim of urgency with regard to preliminary relief sought. Central Point Software Inc. v. Global Software & Assessories, Inc., E.D.N.Y.1994, 859 F.Supp. 640.

## § 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if—

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for—

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—

(A) there is no direct or indirect admission charge; or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions;

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization; the exemption provided by this clause shall extend to any liability for copyright infringement that would otherwise be imposed on such body or organization, under doctrines of vicarious liability or related infringement, for a performance by a concessionnaire,[1] business establishment, or other person at such fair or exhibi-

tion, but shall not excuse any such person from liability for the performance;

(7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring;

(8) performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission of visual signals, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of: (i) a governmental body; or (ii) a noncommercial educational broadcast station (as defined in section 397 of title 47); or (iii) a radio subcarrier authorization (as defined in 47 CFR 73.293–73.295 and 73.593–73.595); or (iv) a cable system (as defined in section 111(f)).

(9) performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8)(iii), *Provided*, That the provisions of this clause shall not be applicable to more than one performance of the same work by the same performers or under the auspices of the same organization.

(10) notwithstanding paragraph 4 [2] above, the following is not an infringement of copyright: performance of a nondramatic literary or musical work in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited, but not including the invitees of the organizations, if the proceeds from the performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain. For purposes of this section the social functions of any college or university fraternity or sorority shall not be included unless the social

function is held solely to raise funds for a specific charitable purpose.

(Pub.L. 94–553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2549; Pub.L. 97–366, § 3, Oct. 25, 1982, 96 Stat. 1759.)

[1] So in original.

[2] So in original. Probably should be "(4)".

## HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports 1976 Acts.**

**Notes of Committee on the Judiciary, House Report No. 94–1476**

Clauses (1) through (4) of section 110 [cls. (1) through (4) of this section] deal with performances and exhibitions that are now generally exempt under the "for profit" limitation or other provisions of the copyright law, and that are specifically exempted from copyright liability under this legislation. Clauses (1) and (2) between them are intended to cover all of the various methods by which performances or displays in the course of systematic instruction take place.

**Face-to-Face Teaching Activities.** Clause (1) of section 110 [cl. (1) of this section] is generally intended to set out the conditions under which performances or displays, in the course f instructional activities other than educational broadcasting, are to be exempted from copyright control. The clause covers all types of copyrighted works, and exempts their performance or display "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution," where the activities take place "in a classroom or similar place devoted to instruction."

There appears to be no need for a statutory definition of "face-to-face" teaching activities to clarify the scope of the provision. "Face-to-face teaching activities" under clause (1) embrace instructional performances and displays that are not "transmitted." The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images. The "teaching activities" exempted by the clause encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.

*Works Affected.*—Since there is no limitation on the types of works covered by the exemption, teachers or students would be free to perform or display anything in class as long as the other conditions of the clause are met. They could read aloud from copyrighted text material, act out a drama, play or sing a musical work, perform a motion picture or filmstrip, or display text or pictorial material to the class by means of a projector. However, nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display, and the clause contains a special exception dealing with performances from unlawfully made copies of motion pictures and other audiovisual works, to be discussed below.

*Instructors or Pupils.*—To come within clause (1), the performance or display must be "by instructors or pupils," thus ruling out performances by actors, singers, or instrumentalists brought in from outside the school to put on a program. However, the term "instructors" would be broad enough to include guest lecturers if their instructional activities remain confined to classroom situations. In general, the term "pupils" refers to the enrolled members of a class.

*Nonprofit Educational Institution.*—Clause (1) makes clear that it applies only to the teaching activities "of a nonprofit

cordings of 1960 production of "Peter Pan" in possession of videotape seller upon determination that they infringed its copyright in production. National Broadcasting Co., Inc. v. Sonneborn, D.Conn.1985, 630 F.Supp. 524, 231 U.S.P.Q. 513.

## § 504. Remedies for infringement: Damages and profits

(a) **In General.**—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) **Actual Damages and Profits.**—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) **Statutory Damages.**—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court it [1] its discretion may reduce the award of statutory damages to a sum of not less than $200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit

educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(Pub.L. 94–553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2585; Pub.L. 100–568, § 10(b), Oct. 31, 1988, 102 Stat. 2860.)

[1] So in original. Probably should be "in".

## HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**
**1976 Acts**
**Notes of Committee on the Judiciary, House Report No. 94–1476**

**In General.** A cornerstone of the remedies sections and of the bill as a whole is section 504 [this section], the provision dealing with recovery of actual damages, profits, and statutory damages. The two basic aims of this section are reciprocal and correlative: (1) to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute.

Subsection (a) lays the groundwork for the more detailed provisions of the section by establishing the liability of a copyright infringer for either "the copyright owner's actual damages and any additional profits of the infringer," or statutory damages. Recovery of actual damages and profits under section 504(b) [subsec. (b) of this section] or of statutory damages under section 504(c) [subsec. (c) of this section] is alternative and for the copyright owner to elect; as under the present law, the plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for minimum statutory damages. However, there is nothing in section 504 [this section] to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages within the range set out in subsection (c).

**Actual Damages and Profits.** In allowing the plaintiff to recover "the actual damages suffered by him or her as a result of the infringement," plus any of the infringer's profits "that are attributable to the infringement and are not taken into account in computing the actual damages," section 504(b) [subsec. (b) of this section] recognizes the different purposes served by awards of damages and profits. Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act. Where the defendant's profits are nothing more than a measure of the damages suffered by the copyright owner, it would be inappropriate to award damages and profits cumulatively, since in effect they amount to the same thing. However, in cases where the copyright owner has suffered damages not reflected in the infringer's profits, or where there have been profits attributable to the copyrighted work but not used as a measure of damages, subsection (b) authorizes the award of both.

The language of the subsection makes clear that only those profits "attributable to the infringement" are recoverable; where some of the defendant's profits result from the infringement and other profits are caused by different factors, it will be necessary for the court to make an apportionment. However, the burden of proof is on the defendant in these cases; in establishing profits the plaintiff need

"(3) A summary of those program features that can be identified as being related to program acceptance both within and across judicial districts.

"(4) A description of the levels of satisfaction relative to the cost per hearing of each program.

"(5) Recommendations to the Congress on whether to terminate or continue chapter 44, or alternatively, to enact an arbitration provision in title 28, United States Code [this title], authorizing arbitration in all Federal district courts."

### LIBRARY REFERENCES

American Digest System

Nature and right to arbitration in general, see Arbitration ⇐1 et seq.

Encyclopedias

Nature; origin, and enforceability of arbitration in general, see C.J.S. Arbitration § 2.

### WESTLAW ELECTRONIC RESEARCH

Arbitration cases: 33k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

## § 652. Jurisdiction

(a) **Actions That May Be Referred to Arbitration.—(1)** Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c) of this section, and section 901(c) of the Judicial Improvements and Access to Justice Act, a district court that authorizes arbitration under section 651 may—

**(A)** allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it if the parties consent to arbitration, and

**(B)** require the referral to arbitration of any civil action pending before it if the relief sought consists only of money damages not in excess of $100,000 or such lesser amount as the district court may set, exclusive of interest and costs.

(2) For purposes of paragraph (1)(B), a district court may presume damages are not in excess of $100,000 unless counsel certifies that damages exceed such amount.

(b) **Actions That May Not Be Referred Without Consent of Parties.**—Referral to arbitration under subsection (a)(1)(B) may not be made—

(1) of an action based on an alleged violation of a right secured by the Constitution of the United States, or

(2) if jurisdiction is based in whole or in part on section 1343 of this title.

(c) **Exceptions From Arbitration.**—Each district court shall establish by local rule procedures for exempting, sua sponte or on

motion of a party, any case from arbitration in which the objectives of arbitration would not be realized—

**(1)** because the case involves complex or novel legal issues,

**(2)** because legal issues predominate over factual issues, or

**(3)** for other good cause.

**(d) Safeguards in Consent Cases.**—In any civil action in which arbitration by consent is allowed under subsection (a)(1)(A), the district court shall by local rule establish procedures to ensure that—

**(1)** consent to arbitration is freely and knowingly obtained, and

**(2)** no party or attorney is prejudiced for refusing to participate in arbitration.

(Added Pub.L. 100–702, Title IX, § 901(a), Nov. 19, 1988, 102 Stat. 4659.)

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
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# AMENDED CONSENT JUDGMENT

AMERICAN SOCIETY OF
COMPOSERS, AUTHORS AND PUBLISHERS

CIVIL ACTION No. 13-95
ENTERED MARCH 14, 1950

01006

# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff*, v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al, *Defendants*. | Civil Action No. 13-95 AMENDED FINAL JUDGMENT |

Plaintiff having filed its complaint herein on February 26, 1941, the defendants having appeared and filed their answer to the complaint denying the substantive allegations thereof, all parties having consented, without trial or adjudication of any issue of fact or law therein, to the entry of a Civil Decree and Judgment, filed March 4, 1941, and jurisdiction having been retained in this Court pursuant to Section VI of said Civil Decree and Judgment for the purpose of granting such modifications of the Civil Decree and Judgment as may be necessary and appropriate; and

Plaintiff having moved the Court that said Civil Decree and Judgment should be modified in certain respects, and all parties hereto consenting to such modifications and the entry of this Amended Final Judgment,

Now, THEREFORE, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any defendant in respect of any such issue and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED that the Civil Decree and Judgment of March 4, 1941 be amended to read as follows:

I. This Court had jurisdiction of the subject matter hereof and of all parties hereto with full power to enter this Judgment. The complaint states a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

II. As used in this Judgment:

(A) "ASCAP" means the defendant American Society of Composers, Authors and Publishers;

(B) "Right of public performance" means the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, sometimes referred to as "small performing right";

(C) "Motion picture performance right" means the right of public performance of music which is recorded in order to be performed in synchronism or timed relation to the exhibition of motion pictures;

(D) "ASCAP repertory" means those compositions the right of public performance of which ASCAP has or hereafter shall have the right to license or sublicense;

(E) "User" means any person, firm or corporation who or which (1) owns or operates an establishment or enterprise where copyrighted musical compositions are performed publicly for profit, or (2) is otherwise directly engaged in giving public performance of copyrighted musical compositions for profit, or (3) is entitled to obtain a license from ASCAP under Section V of this Judgment.

III. The provisions of this Judgment applicable to the defendant ASCAP shall apply to such defendant, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons, including members, acting or claiming to act under, through or for such defendant. None of the injunctions or requirements herein imposed upon the defendants shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories or possessions, such acquisition or licensing being subject to the provisions of the Final Judgment entered this day in Civil Action No. 42-245.

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of

any member to issue to a user non-exclusive licenses for rights of public performance;

(C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated;

(D) Hereafter granting any license for rights of public performance in excess of five years' duration, except for motion picture performance rights which are licensed pursuant to Section V (C) of this Judgment;

(E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;

(F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copyright infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;

(G) Restricting the right of any member to withdraw from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;

(H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances, or the

value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

V. Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory as follows:

(A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting, or simultaneous performance by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;

(B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially-sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription or recordation by all radio stations or television stations in the United States enumerated by the licensee, without requiring separate licenses for such enumerated stations for such performance;

(C) To any person engaged in producing motion pictures (herein referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with

the following requirements and in accordance with all other provisions of this Judgment not inconsistent therewith:

(1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;

(2) Upon written request of any motion picture producer such licenses shall be issued on a "per film" basis for the compositions in such film which are in the ASCAP repertory;

(3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;

(4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP and has paid a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such producer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;

(5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

VI. Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospec

tive user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter.

VII. Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in

connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A)

hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

X. No officer or director of ASCAP, or any person acting on its behalf, shall participate in or vote on any question relating to any transaction or negotiation involving ASCAP and a licensee, or prospective licensee, where such officer, director, or other person has any pecuniary interest in such licensee or prospective licensee, or in any subsidiary or affiliate thereof, or in any contractual relationship with any such licensee or prospective licensee.

XI. Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary considera-

tion to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

XII. Defendant ASCAP is hereby ordered and directed, within three months after the entry of this Judgment, to provide in its Articles of Association, effective as of the date of this Judgment, that ASCAP's members be prohibited from:

(A) At any time, while a member of ASCAP or thereafter, instituting, or threatening to institute, or maintaining or continuing any suit or proceeding for acts of copyright infringement relating to motion picture performance rights (1) alleged to have occurred prior to the date of this Judgment, or (2) where corresponding synchronization rights have been granted prior to the date of this Judgment;

(B) While a member of ASCAP, granting a synchronization or recording right for any musical composition to any motion picture producer unless the member or members in interest or ASCAP grants corresponding motion picture performance rights in conformity with the provisions of this Judgment.

XIII. In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its members an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant ASCAP is hereby ordered and directed to provide in its Articles of Association:

(A) That the members of the Board of Directors shall be elected by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may cast for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions;

(B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in

writing and shall be made available to any member upon request;

(C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;

(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of revenues, which will adequately apprise the respective members of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbiters or panels as to such members and the basis therefor.

XIV. Immediately following entry of this Judgment, defendant ASCAP shall upon written request from any prospective user inform such user whether any compositions specified in such request are in the ASCAP repertory, and make available for public inspection such information as to the ASCAP repertory as it has. Defendant ASCAP is furthermore ordered and directed to prepare within two years, and to maintain and keep current and make available for inspection during regular office hours, a list of all musical compositions in the ASCAP repertory, which list will show the title, date of copyright and the author, composer and current publisher of each composition.

XV. Defendant ASCAP is hereby ordered and directed to admit to membership, non-participating or otherwise,

(A) Any composer or author of a copyrighted musical composition who shall have had at least one work of his composition or writing regularly published;

(B) Any person, firm, corporation or partnership actively engaged in the music publishing business, whose musical publications have been used or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

XVI. For the purpose of securing compliance with this Amended Final Judgment, duly authorized representatives of the Department of Justice shall upon the written request of the Attorney General or an Assistant Attorney General, and on

reasonable notice to defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Judgment, provided, however, that information received by the means permitted in this Section XVI shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

XVII. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and any time within two (2) years from said date apply to this Court for the vacation or modification of Section V (C) hereof). During the applicable periods specified above, defendant ASCAP is hereby ordered and directed to conduct its affairs, including the making of agreements to acquire or license the rights of public performance, so as not unreasonably to complicate or delay the enforcement of any such further relief requested by plaintiff and granted by this Court pursuant to the terms of this Section.

XVIII. This Amended Final Judgment shall become effective from the date of entry hereof, except that the provisions o

Sections IV (G), XIII and XV shall become effective three months after the date of entry hereof, and the provisions of Section XI shall become effective eight months after the date of entry hereof. This Amended Final Judgment supersedes the Civil Decree and Judgment entered herein on March 4, 1941, but shall not be construed to make proper or lawful or sanction any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited by said Civil Decree and Judgment of March 4, 1941.

Approved:

March 14, 1950

HENRY W. GODDARD
United States District Judge

We hereby consent to the entry of the foregoing Judgment.

For the plaintiff

SIGMUND TIMBERG
Special Assistant to the
Attorney General
WILLIAM D. KILGORE, JR.
HAROLD LASSER
Special Attorneys

HERBERT A. BERGSON
Assistant Attorney General
MELVILLE C. WILLIAMS
Special Assistant to the
Attorney General
LEVIE H. SAYPOL
United States Attorney

For the defendants

ROBERT P. PATTERSON
HERMAN FINKELSTEIN
OSCAR COX
Schwartz & Frohlich
By LOUIS D. FROHLICH

Judgment entered:

WILLIAM V. CONNELL
Clerk
March 14, 1950

[¶ 71,941] United States v. Broadcast Music, Inc. and RKO General, Inc.

In the United States District Court, Southern District of New York. Civil No. 64 Civ. 3787. Entered December 29, 1966.

Case No. 1835 in the Antitrust Division of the Department of Justice.

Sherman Act

Monopolization—Copyrighted Music—Consent Judgment.—A firm was prohibited, under the terms of a consent judgment, from failing to permit writers and publishers of musical compositions to grant non-exclusive licenses for specified performances of such works and from engaging in the commercial publication or recording of music or in the commercial distribution of sheet music or recordings. The decree also precludes the firm from entering into any contracts which force other parties to record or perform any stated amount or percentage of music to which it has licensing rights and from entering into any contract which would require a publisher to refrain from doing business with another performing rights organization. Restrictions on securing future performing rights from writers and publishers under contract to similar companies are also included.

See Monopoly, Vol. 1, ¶ 1550; Department of Justice, Vol. 2, ¶ 8834.10.

For the plaintiff: Donald F. Turner, Assistant Attorney General, Gordon B. Spivack, William D. Kilgore, Jr., John L. Wilson, Charles D. Mahaffie, Jr., and Hugh P. Morrison, Jr., Attorneys, Department of Justice.

For the defendant: Rosenman Colin Kaye Petschek Freund & Emil, by Asa D. Sokolow, for Broadcast Music, Inc.

Final Judgment

McLean, D. J.: Plaintiff, United States of America, having filed its complaint herein on December 10, 1964, and defendant having filed its answer denying the substantive allegations of such complaint, and the parties by their respective attorneys having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by either party with respect to any such issue:

Now, therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I.

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states claims for relief against the defendant under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(A) "Defendant" means the defendant Broadcast Music, Inc., a New York Corporation;

(B) "Programming period" means a fifteen minute period of broadcasting commencing on the hour and at fifteen, thirty and forty-five minutes past the hour without regard to whether such period contains one or more programs or announcements.

III.

[*Applicability*]

The provisions of this Final Judgment shall apply to defendant and to each of its subsidiaries, successors, assigns, officers, directors, servants, employees and agents, and to all persons in active concert or participation with defendant who receive actual notice of this Final Judgment by personal service or otherwise. None of the provisions of this Final Judgment shall apply outside the United States of America, its territories, and possessions.

IV.

[*Non-exclusive Licenses*]

Defendant is enjoined and restrained from:



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(A) Failing to grant permission, on the written request of all writers and publishers of a musical composition including the copyright proprietor thereof, allowing such persons to issue to a music user making direct performances to the public a non-exclusive license permitting the making of specified performances of such musical composition by such music user directly to the public, provided that the defendant shall not be required to make payment with respect to performances so licensed.

[*Publication, Recording and Distribution*]

(B) Engaging in the commercial publication or recording of music or in the commercial distribution of sheet music or recordings.

V.

[*Performance Rights*]

(A) Defendant shall not refuse to enter into a contract providing for the licensing by defendant of performance rights with any writer who shall have had at least one copyrighted musical composition of his writing commercially published or recorded, or with any publisher of music actively engaged in the music publishing business whose musical publications have been commercially published or recorded and publicly promoted and distributed for at least one year, and who assumes the financial risk involved in the normal publication of musical works; provided, however, that defendant shall have the right to refuse to enter into any such contract with any writer or publisher who does not satisfy reasonable standards of literacy and integrity if the defendant is willing to submit to arbitration in the County, City and State of New York the reasonableness and applicability of such standards, under the rules then prevailing of the American Arbitration Association, with any writer or publisher with whom defendant has refused so to contract.

(B) Defendant shall not enter into any contract with a writer or publisher requiring such writer or publisher to grant to defendant performing rights for a period in excess of five years, provided, however, that defendant may continue to license, as if under the contract, all musical compositions in which the defendant has performing rights at the dates of termination of any such contract until all advances made by defendant to such writers and publishers shall have been earned or repaid.

(C) Upon the termination, at any time hereafter, of any contract with a writer or publisher relating to the licensing of the right publicly to perform any musical composition, defendant shall continue to pay for performances of the musical compositions of such writer or publisher licensed by defendant upon the basis of the current performance rates generally paid by defendant to writers and publishers for similar performances of similar compositions for so long as such performing rights are not otherwise licensed.

VI.

(A) Defendant shall not acquire rights of public performance in any musical compositions from any publisher under a contract which requires the officers, directors, owners or employees of such publisher to refrain from publishing or promoting musical works licensed through another performing rights organization, provided that nothing contained in this paragraph shall prevent defendant from entering into a contract with a publishing entity which requires such entity not to license any performance rights through any other performing rights organization during the term of the contract, and requiring that any works licensed by such officers, directors, owners or employees through another performing rights organization be licensed by a separate publishing entity which does not have a name identical with or similar to the name of any publishing entity with which defendant has contracted.

(B) Defendant shall not enter into any agreement for the acquisition or the licensing of performing rights which requires the recording or public performance of any stated amount or percentage of music, the performing rights in which are licensed or are to be licensed by defendant.

VII.

[*Rates*]

(A) Defendant shall make available at reasonable intervals, to all writers and publishers who have granted performance rights to it, a complete statement of the performance rates (to writers, those applicable to writers, and to publishers, those applicable to publishers), currently utilized by it for all classifications of performance and musical compositions.

(B) Defendant will not offer or agree to make payments in advance for a stated period for future performing rights which are not either repayable or to be earned by means of future performance to any writer or publisher who, at the time of such offer

or agreement, is a member of or under direct contract for the licensing of such performing rights with any other United States performing rights licensing organization, provided that this restriction shall not apply (1) in the case of any such writer or publisher who at any time prior to said offer or agreement had licensed performing rights through defendant or (2) in the case of any such writer or publisher who is a member of or directly affiliated with any other United States performing rights licensing organization which makes offers or makes payments similar to those forbidden in this subparagraph to writers or publishers then under contract to defendant.

(C) Defendant shall include in all contracts which it tenders to writers, publishers and music users relating to the licensing of performance rights a clause requiring the parties to submit to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association, all disputes of any kind, nature or description in connection with the terms and conditions of such contracts or arising out of the performance thereof or based upon an alleged breach thereof.

## VIII.

*[Discriminatory Rates]*

(A) Defendant shall not enter into, recognize as valid or perform any performing rights license agreement which shall result in discriminating in rates or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different rates or terms shall not be considered discrimination within the meaning of this section; and provided further that nothing contained in this section shall prevent changes in rates or terms from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

(B) Defendant shall, upon the request of any unlicensed broadcaster, license the rights publicly to perform its repertory by broadcasting on either a per program or per programming period basis, at defendant's option. The fee for this license shall relate only to programs (including announcements), or to programming periods, during which a licensed composition is performed. The fee shall be expressed, at defendant's option, either (1) in dollars, (2) as a percentage of the revenue which the broadcaster received for the use of its broadcasting facilities or (3), in the case of sustaining programs or programming periods, as a percentage of the applicable card rate had the program or programming period been commercially sponsored. In the event defendant offers to license broadcasters on bases in addition to a per program or per programming period basis, defendant shall act in good faith so that there shall be a relationship between such per program or such per programming period basis and such other bases, justifiable by applicable business factors including availability, so that there will be no frustration of the purpose of this section to afford broadcasters alternative bases of license compensation.

## IX.

*[Broadcast Licensing]*

(A) Defendant shall not license the public performance of any musical composition or compositions except on a basis whereby, insofar as network broadcasting by a regularly constituted network is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

(B) With respect to any musical composition in defendant's catalogue of musical compositions licensed for broadcasting and which is or shall be lawfully recorded for performance on specified commercially sponsored programs on an electrical transcription or on other specially prepared recordation intended for broadcasting purposes, defendant shall not refuse to offer to license the public performance by designated broadcasting stations of such compositions by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all stations enumerated by the licensee, on terms and conditions fixed by defendant, without requiring separate licenses for such enumerated stations.

(C) Defendant shall not, in connection with any offer to license by it the public performance of musical compositions by music users other than broadcasters, refuse


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to offer a license at a price or prices to be fixed by defendant with the consent of the copyright proprietor for the performance of such specific (i.e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

X.

[*Performance Restrictions*]

(A) Defendant shall not assert or exercise any right or power to restrict from public performance by any licensee of defendant any copyrighted musical composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this paragraph shall prevent defendant from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performance or the value of the public performance rights therein or to protect the dramatic performing rights therein, or, as may be reasonably necessary in connection with any claim or litigation involving the performance rights in any such composition.

(B) Defendant, during the term of any license agreements with any class of licensees, shall not make any voluntary reductions in the fees payable under any such agreements, provided, however, that nothing herein shall prevent defendant from lowering any fees or rates to any or all classes of licensees in response to changing conditions affecting the value or marketability of its catalogue to such class or classes, or where necessary to meet competition.

XI.

[*Compliance and Enforcement*]

For the purpose of securing or determining compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendant relating to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of defendant and without restraint or interference from it, to interview officers or employees of defendant, who may have counsel present regarding any such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section XI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the Plaintiff, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XII.

[*Effective Date*]

All of the provisions of this Final Judgment shall become effective on the entry thereof, except as to paragraph C of Article VII, which shall not become effective until 90 days after the date of entry of this Final Judgment.

XIII.

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

---

JOHNSON SMITH DOVER KITZMILLER & STEWART

May 8, 1996

BY HAND

Harry Katrichis, Esq.
Counsel
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, D.C. 20515-6315

Dear Mr. Katrichis:

Enclosed is the written statement of Edward P. Murphy, President and CEO of the National Music Publishers' Association, Inc. ("NMPA"), on issues relating to music licensing. Chairman Meyer's willingness to include NMPA's statement in the record of today's oversight hearing will be greatly appreciated by NMPA and its members.

Please do not hesitate to call me if I can answer any questions concerning the statement. I serve as NMPA's Washington representative.

Sincerely,

Susan O. Mann

Enclosure

JOHNSON, SMITH, DOVER, KITZMILLER & STEWART, INC.
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Washington, DC 20002

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May 6, 1996

**BY HAND**

Harry Katrichis, Esq.
Counsel
House Committee on Small Business
2361 Rayburn House Office Building
Washington, D.C. 20515-6315

Re: May 8 Hearing on Music Licensing

Dear Harry:

In line with our conversations over the past couple of weeks, enclosed is a copy of the written statement of George David Weiss, President of The Songwriters Guild of America, for inclusion in the record of your May 8 hearing on music licensing. Also enclosed is a copy of Mr. Weiss' cover letter to Chairman Meyers.

On behalf of my client, I greatly appreciate your willingness to include SGA's views in the hearing record.

Please call if I can answer any questions or send along anything else.

Thank you again.

Sincerely,

James J. Schweitzer

Enclosures

**Music Licensing Fairness Coalition**

## SUPPORT THE FAIRNESS IN MUSICAL LICENSING ACT OF 1995,

**S. 1137 and H.R. 789**

The Music Licensing Coalition, a group representing business organizations ranging from restaurateurs to retailers, urges Congress to enact S. 1137 and H.R. 789, the "Fairness in Musical Licensing Act of 1995". This legislation would amend federal copyright law to provide businesses with greater protection against arbitrary pricing, heavy-handed enforcement, and certain other practices of music licensing organizations such as ASCAP (the American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.) and SESAC.

### S. 1137 AND H.R. 789 WOULD DO THE FOLLOWING:

■**Exempts businesses from having to pay fees for incidental radio and TV music.** Businesses that use radio or TV music purely as background and that do not charge customers to listen to the music would be exempt from licensing fees—regardless of the number of TVs or radios in use. This would end the practice of "double dipping" by music licensors, who charge restaurants, taverns and retailers millions of dollars in licensing fees for playing background music, even though radio and television stations already pay huge licensing fees to ASCAP, BMI and SESAC.

■**Sets up a forum for resolving license disputes.** ASCAP, BMI and SESAC have near-monopoly power to set fees, raise rates, and penalize businesses that fail to fall in line with the music licensors' demands. Any business that objects has no recourse other than to file a costly lawsuit in the federal court for the Southern District of New York, the single federal court authorized to handle such disputes. Obviously, for most business people, the cost of filing and fighting a case in New York State is out of reach. The Fairness in Musical Licensing Act would set up a third-party arbitration system to help resolve disputes and determine fair and reasonable fees in an expeditious and less costly manner.

■**Require music licensing groups to provide business customers with information on their "product."** A restaurateur, bar owner or retailer who wants to save money by limiting its music to one licensor's repertoire finds this to be virtually impossible since for all practical purposes the societies' repertoires are not accessible to the average business person. The Fairness in Musical Licensing Act would require that societies make a list of music they represent available to establishments so business people who use music would have full information regarding the product (i.e., the music repertoire) that music licensing societies "sell."

In addition, it would provide a per programming license for specialty broadcasters; require the societies to respect contractual arrangements regarding music licensing liability among owners, lessors, lessees and sublessees of property (such as convention centers and trade shows); and, require the Department of Justice to report annually to Congress regarding their oversight of the music licensing system.

To cosponsor, call Dan Naatz on 224-6441 (S. 1137) or Doug Sweeney (H.R. 789). For more information call Katy McGregor at the National Restaurant Association on 331-5913.

JAMES SENSENBRENNER, JR
NINTH DISTRICT WISCONSIN

COMMITTEE ON THE JUDICIARY

COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY

WASHINGTON OFFICE
ROOM 2332
RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4909
202-225-5101

DISTRICT OFFICE
120 BISHOPS WAY
BROOKFIELD, WI 53005-6294
414-784-1111

OUTSIDE MILWAUKEE METRO
CALLING AREA
1-800-242-1119

# Congress of the United States
## House of Representatives
### Washington, DC 20515-4909

September 21, 1995

Dear Colleague:

I invite you to help level the playing field for commercial establishments in our districts by cosponsoring **H.R. 789, the Fairness in Musical Licensing Act of 1995**. H.R. 789 clarifies the law to provide an exemption from the payment of royalties to music performing rights societies such as ASCAP, BMI, & SESAC for incidental music which is rebroadcast over radio and T.V. in a commercial establishment.

There seems to be a lot of confusion about what H.R. 789 really does. Despite what you may have read or heard, H.R. 789 *does not* exempt commercial establishments from royalty payments for the use of all music, only that which is already paid for by radio and television broadcasters. It does not affect royalty payments as they apply to the use of tapes, CD's, live bands, or juke boxes.

H.R. 789 provides an exemption for businesses from playing radio and television broadcasts because restaurants and bars have no ability to directly control the content of a broadcast as one could with tapes and CD's. The mere possibility that a copyrighted work (for which a perfomance royalty has already been paid by the broadcaster) could be retransmitted over a radio or T.V. in a commercial establishment is enough to convince small business owners that they must respond to threats by the music performing rights societies and pay-up or face stiff fines and legal expenses. In addition, H.R. 789 makes the performing rights societies more accountable to those from whom they assess fees.

The time has come to restore fairness in musical licensing. Please join the bipartisan list of 143 Members who have responded to the cries from small businesspeople in their district and cosponsor H.R. 789. For more information or to cosponsor this common sense legislation, please contact Doug Sweeney at ext. 5-5101.

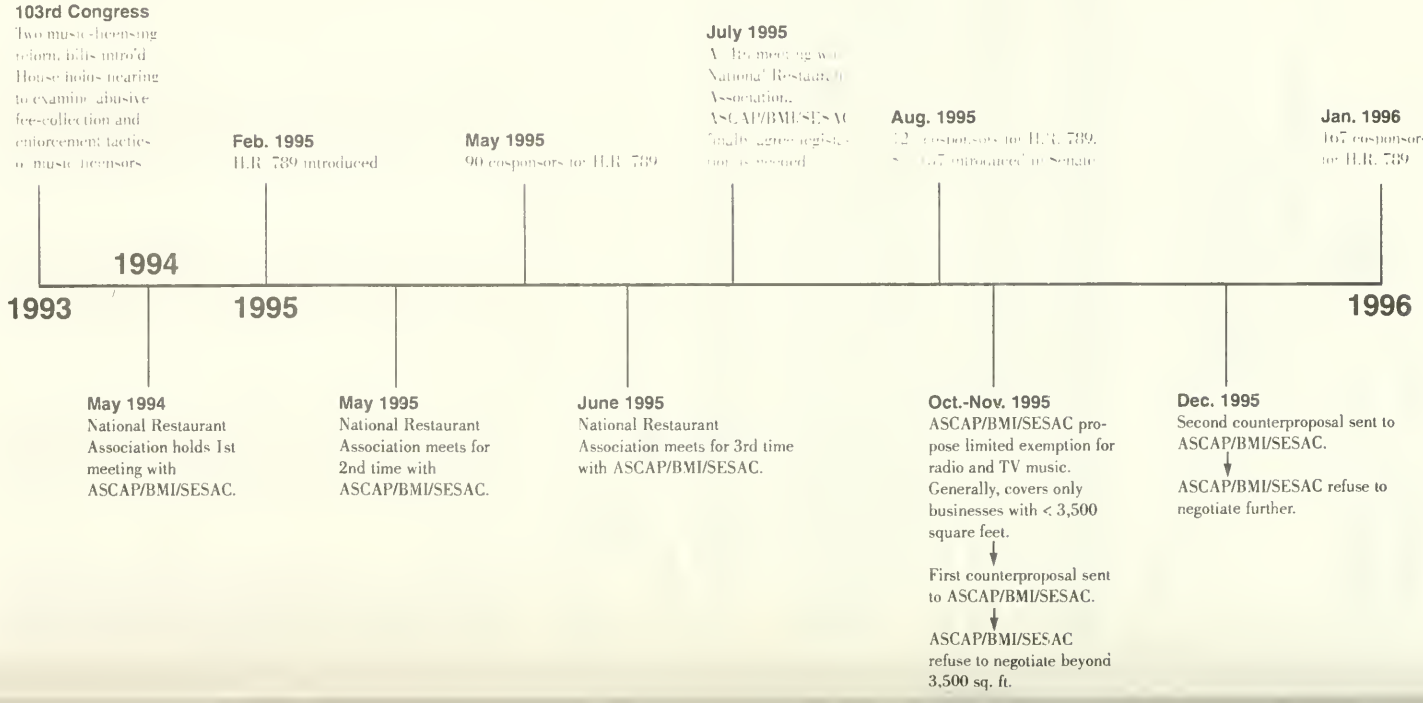
Sincerely,

F. JAMES SENSENBRENNER, JR.,
Member of Congress

## COSPONSORS OF H.R. 789

Wayne Allard
Robert Andrews
Spencer Bachus
Scotty Baesler
Cass Ballenger
James Barcia
Bob Barr
Bill Barrett
Roscoe Bartlett
Joe Barton
Peter Blute
John Boehner
Sam Brownback
Richard Burr
Dan Burton
Ken Calvert
Dave Camp
Michael Castle
Saxby Chambliss
Jon Christensen
William Clinger
Mac Collins
Larry Combest
Gary Condit
Christopher Cox
Philip Crane
Michael Crapo
Frank Cremeans
Barbara Cubin
Duke Cunningham
Calvin Dooley
John Doolittle
Bob Dornan
Michael Doyle
John Duncan
Jennifer Dunn
Richard Durbin
Vernon Ehlers
Robert Ehrlich
Bill Emerson
Thomas Ewing
Jon Fox
Bob Franks
Rodney Frelinghuysen
Elton Gallegly
Greg Ganske
Wayne Gilchrest
Paul Gillmor
Gil Gutknecht
Dennis Hastert
Doc Hastings
J.D. Hayworth
Fred Heineman
Wally Herger
Earl Hilliard
David Hobson
Peter Hoekstra
Stephen Horn
Tim Hutchinson
Bob Inglis
Andrew Jacobs
Marcy Kaptur
John Kasich
Jack Kingston
Gerald Kleczka
Scott Klug
Joe Knollenberg
Jim Kolbe
Ray LaHood
Tom Latham
Steven LaTourette
Greg Laughlin
Jerry Lewis
Ron Lewis
Jim Lightfoot
William Lipinski
Frank LoBiondo
James Longley
Donald Manzullo
Frank Mascara
Paul McHale
John McHugh
Scott McInnis
Buck McKeon
Michael McNulty
Jan Meyers
Jack Metcalf
Sonny Montgomery
James Moran
Connie Morella
John Murtha
George Nethercutt
Mark Neumann
Robert Ney
Charlie Norwood
Jim Nussle
James Oberstar
Frank Pallone
Mike Parker
Ed Pastor
Bill Paxon
L.F. Payne
Tim Petri
Owen Pickett
John Porter
Deborah Pryce
Jack Quinn
George Radanovich
Nick Rahall
Frank Riggs
Pat Roberts
Dana Rohrabacher
Charlie Rose
Toby Roth
Marge Roukema
Thomas Sawyer
Steven Schiff
Andrea Seastrand
Linda Smith
Christopher Smith
Mark Souder
Cliff Stearns
Steve Stockman
Bob Stump
Bart Stupak
James Talent
Randy Tate
Frank Tejeda
William Thornberry
Todd Tiahrt
Peter Torkildsen
Bob Torricelli
Fred Upton
Peter Visclosky
Harold Volkmer
Barbara Vucanovich
James Walsh
Jerry Weller
Roger Wicker
Frank Wolf
Don Young
Bill Zeliff
Dick Zimmer

# TIMELINE: THE MUSIC LICENSING DEBATE


103rd Congress
Two music-licensing reform bills introd
House holds hearing to examine abusive fee-collection and enforcement tactics o music licensors
Feb. 1995
H.R. 789 introduced
May 1995
90 cosponsors for H.R. 789
July 1995
A Bo meeting wit National Restaurant Association.. ASCAP/BMI/SESA C finally agree regist rate is reward
Aug. 1995
52 cosponsors for H.R. 789.
67 introduced in Senate
Jan. 1996
167 cosponsors for H.R. 789
1993
1994
1995
1996
May 1994
National Restaurant Association holds 1st meeting with ASCAP/BMI/SESAC.
May 1995
National Restaurant Association meets for 2nd time with ASCAP/BMI/SESAC.
June 1995
National Restaurant Association meets for 3rd time with ASCAP/BMI/SESAC.
Oct.-Nov. 1995
ASCAP/BMI/SESAC propose limited exemption for radio and TV music. Generally, covers only businesses with < 3,500 square feet.
First counterproposal sent to ASCAP/BMI/SESAC.
ASCAP/BMI/SESAC refuse to negotiate beyond 3,500 sq. ft.
Dec. 1995
Second counterproposal sent to ASCAP/BMI/SESAC.
ASCAP/BMI/SESAC refuse to negotiate further.

# H.R. 789 — FAIRNESS IN MUSICAL LICENSING
# IT'S TIME TO GET THE OTHER SIDE MOVING AND PASS A BILL

H.R. 789, the "Fairness in Musical Licensing Act," provides legal protections for businesses that deal with ASCAP, BMI and SESAC. H.R. 789 is *not* about cutting songwriters' royalties. It's about the way ASCAP, BMI and SESAC operate, and about long-overdue changes that will make the system fairer for all music users.

Since an initial meeting with ASCAP, BMI and SESAC in May of 1994, the National Restaurant Association and members of Congress have tried to negotiate a solution, but with little success. *That's because just one side's doing the compromising. It's time to get both sides moving so Congress can pass a bill.*

| Original bill | National Restaurant Association concessions | ASCAP/BMI/SESAC position |
|---|---|---|
| FEES FOR RADIO AND TV MUSIC<br>H.R. 789 provides for the logical expansion of current law to allow businesses to play incidental music on radios and TVs without violating federal copyright law. | ✔ Willing to discuss exempting certain businesses rather than all businesses.<br>✔ Two counterproposals offered for a *reasonable* square-footage exemption in November and December 1995. | ✖ Refused for over a year to acknowledge need for legislation. Finally conceded in July 1995 that legislation is needed.<br>✖ Proposed minimal exemption in October 1995 for businesses under 3,500 square feet. Few businesses would qualify.*<br>✖ Refused to respond to November and December counterproposals. |
| ARBITRATING DISPUTES<br>H.R. 789 gives businesses the right to arbitrate fee disputes in local forums rather than being forced to file a lawsuit in NYC. | ✔ Willing to negotiate for regional rather than local arbitration sites.<br>✔ Willing to negotiate who decides disputes. | ✖ Refuse to acknowledge any need for arbitration outside New York City. |
| PROVIDING SONG LISTS<br>H.R. 789 requires music licensors to provide consumers with full information on the product—the music—consumers are buying. | ✔ Willing to accept alternative to printed directories.<br>✔ Willing to accept partial information on artists, songs.<br>✔ Willing to drop requirement for phone numbers/addresses of copyright-holders. | ✖ Refuse to discuss any legislative solution.<br>✖ Song lists remain inaccessible. (BMI has agreed to list songs on-line).<br>✖ Refuse to guarantee liability protection for businesses that rely on societies' song lists. |
| OVERSIGHT<br>H.R. 789 requires the Justice Dep't to report once a year on whether ASCAP and BMI are complying with court-ordered consent decrees. | ✔ Dropped all demands for Justice Department report. | |
| VICARIOUS LIABILITY<br>H.R. 789 makes sure trade show operators can't be held liable for exhibitors' music. | ✔ Agreed to negotiate for a solution outside legislation. | |
| OTHER ISSUES<br>H.R. 789 (1) exempts religious-service broadcasts from license fee obligations and (2) authorizes an alternative to a "blanket license." | | ✖ Refuse to discuss exempting religious broadcasters from licensing fees.<br>✖ Refuse to discuss any alternative to blanket licenses. |

*[illegible] 3,500 [illegible]

**Music Licensing Fairness Coalition**

THE FAIRNESS IN MUSICAL LICENSING ACT OF 1995
H.R. 789

**Section 1.** Cites title as the "Fairness in Musical Licensing Act of 1995."

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**Section 3.** Establishes the right to binding local arbitration to resolve licensing disputes between music users and licensing organizations. Current law requires all disputes, regardless of the amount in dispute or the size of the business involved, to be resolved in federal court in New York City.

**Section 4.** Requires licensing organizations to offer radio broadcasters flexible license fee structures that account for specialty broadcasters' (e.g., religious, classical, foreign language) limited use of music. Also authorizes licensing disputes to be decided in local federal courts rather than a sole New York City court required by current law.

**Section 5.** Requires licensing organizations to publish written directories of their repertoires every six months and to provide updated computer on-line access to their repertoires. Currently it is a practical impossibility for businesses to avoid paying all three societies, because it is extraordinarily difficult to learn what songs each society licenses.

**Section 6.** Requires the Department of Justice to report annually to Congress regarding their oversight of the music licensing system. The Department's role results from its being a party to the court-approved consent decrees that govern the societies' activities.

**Section 7.** Requires licensing societies to respect contractual arrangements regarding music licensing liability among owners, lessors, lessees and sublessees of property (e.g., convention centers, trade shows and exhibitors).

**Section 8.** Exempts religious service broadcasts from license fee obligations.

**Section 9.** Definitions and conforming amendments.

# THE FAIRNESS IN MUSICAL LICENSING ACT OF 1995
# H.R. 789

## THE ISSUE

After years of heavy-handed, monopolistic practices by ASCAP, BMI and SESAC, a strong coalition of smaller business including restaurateurs, retailers, and specialty radio broadcasters is urging Congress to level the playing field by enacting the Fairness in Musical Licensing Act of 1995. This legislation, introduced by Rep. F. James Sensenbrenner, Jr. (R-WI), would amend federal copyright law to provide fair protection against arbitrary pricing, discriminatory enforcement and abusive collection practices of these music licensing organizations.

## THE LEGISLATION

**SECTION 1. Cites the title of H.R. 789 as the "Fairness in Musical Licensing Act of 1995."**

**SECTION 2. Expands current law to exempt certain business from the requirement to pay for the use of incidental radio and TV music.**

Under current law, businesses such as restaurants, retail stores and dentist offices that use radios or TV's are generally exempt from paying copyright licensing fees when they play a single "homestyle" radio or TV. Recognizing that rapid technological advances in home electronics have confused the definition of "homestyle," the Act exempts businesses using radios or TV's from licensing fee obligations so long as the music is background or incidental to the main purpose of the business and customers are not charged a fee to listen to the music.

**SECTION 3. Establishes the right to binding arbitration in resolving licensing disputes between music users such as restaurants and retail stores and the music licensing organizations.**

Currently, ASCAP, BMI AND SESAC have monopoly power to set fees, raise rates and penalize businesses that fail to meet their demands. Any business that objects has no recourse other than to file a costly lawsuit in the federal court of the Southern District of New York, the only court authorized to handle such disputes. Such costs are prohibitive for most music users, especially smaller businesses, and eliminates any negotiating leverage they might otherwise have regardless of the facts of the case.

**SECTION 4. Requires music licensing groups to offer radio broadcasters alternative licensing agreements.**

Music licensing organizations refuse to offer radio broadcasters a reasonable alternative to their "blanket" licenses which, in effect, require stations to pay for the rights to air music 24 hours a day, seven days a week. As a result, stations that broadcast limited amounts of copyrighted music, such as religious, classical music and foreign language stations, are being forced to pay for music they don't even play. The Fairness in Musical Licensing Act of 1995 requires ASCAP, BMI and SESAC to offer radio broadcasters a license fee structure that varies in proportion to the amount of music they play.

**SECTION 5. Requires licensing organizations to provide information about their repertoire.**

A music user that wants to know what it is paying for or, possibly, to manage its music use in a more economically rational way cannot do so because, for all practical purposes the repertoires are not accessible. The Act requires the licensing organizations to identify both in print and on-line, the musical titles they represent.

**SECTION 6. Requires the Department of Justice to exercise increased oversight.**

Under the court-approved consent decrees that govern the practices of the two largest music licensing societies -- ASCAP and BMI -- the Justice Department is responsible for bringing compliance issues to the court's attention. In the past, music users have found their complaints to the Justice Department generally ignored. The Act will require Justice to report to Congress annually on the nature of complaints they receive about consent decree compliance and the actions they have taken in response.

**SECTION 7. Prohibits "vicarious liability."**

The Act states that the owner of a facility or the organizer of an event shall not be liable for the failure of a lessee or exhibitor to properly license musical works it uses as long as the contract for the use of the space prohibits such infringement and the owner or organizer has no control over the music selection.

**SECTION 8. Exempts the broadcast of religious services.**

Current law exempts the use of copyrighted music in church services from the requirement to pay license fees. The Fairness in Musical Licensing Act of 1995 extends the same exemption to the broadcast of live or pre-recorded religious services.

**SECTIONS 9 AND 10. Conforming amendments and definitions.**

# MYTHS AND FACTS ABOUT MUSIC LICENSING
# and
# WHY H.R. 789 IS NECESSARY

**MYTH:** **Music licensing organizations represent the "little people."**

**FACT:** ASCAP, BMI and SESAC are bureaucratic monopolist collective bargaining agencies. They are music's equivalent to the local power or telephone companies, but in the absence of accountable public oversight there is virtually no limit on their prices and little oversight of their business practices.

**MYTH:** **The current music licensing system is market-oriented and fair to all participants.**

**FACT:** In the free market, customers can inspect what they are buying and negotiate a fair price, or purchase an alternative product. Music licensing customers get no product information, no comparison shopping opportunities, and no way to choose an alternative product because no one knows whether a song is in the repertoire of ASCAP, BMI or SESAC until a lawsuit is threatened or filed.

**FACT:** The music licensing societies use their monopoly powers to force specialty radio stations to pay for costly "one-size-fits-all" licenses, regardless of how much music they actually use.

**MYTH:** **The current music licensing system protects America's intellectual property and American songwriters and publishers.**

**FACT:** The secrecy-laden music licensing system best protects its administrators, who not only exploit their monopoly position to treat licensees unfairly, but who also treat the beneficiaries — songwriters and publishers — with impunity. It has been reported that more than $140 million collected annually by the societies is used for "overhead" — including the accumulation of a litigation fund in excess of $100 million that is explicitly used to intimidate small businesses into "compliance."

**MYTH:** **ASCAP and BMI are required by their consent decrees to license anyone who asks at a fair price. Rate disputes are handled fairly pursuant to the ASCAP and BMI consent decrees.**

**FACT:** "Fair" prices are determined by the societies, and can only be challenged by initiating a lawsuit in a single court located in New York City. The mere cost of the airline ticket and lawyers persuade most small businesses to pay whatever fee is demanded rather than fight.

**FACT:** During the entire forty-five year history of the current music licensing scheme, only three music users have been able to afford the millions of dollars it costs to initiate a case and continue it through to a verdict. In each case, however, the user was victorious in court, which demonstrates that access to the system is the key to fairness in musical licensing. This is hardly a system that is fair to small business.

MYTH: **The licensing societies would like a negotiated solution that assists small business.**

FACT: Invitations to negotiate have been employed by ASCAP and BMI previously to distract Members of Congress from the real issues in this legislation and escape an uncomfortable situation — the fact that 64 Members of Congress have cosponsored H.R. 789, which should justify a hearing at which small businesspeople could tell the subcommittee about the societies' heavy-handed "customer relations."

FACT: The societies' representatives have previously told Coalition representatives that the only subject they will negotiate is rates — how much small business music users will pay. The Coalition's concerns, and the legislation, are broader than rates, and include structural changes to make the system fair to all consumers of music.

MYTH: **Music licensing reform legislation would be a confiscation of intellectual property and significantly reduce songwriters' income.**

FACT: Songwriters and licensing societies are, and would continue to be should H.R. 789 be enacted, compensated handsomely for every performance in a commercial establishment. Broadcast networks, broadcast stations, cable networks, cable systems or satellite systems — and often two or three of them — each pay amply for the very same performances that business establishments are asked to pay for again.

MYTH: **Music licensing reform legislation would impose onerous, expensive and unnecessary burdens on the licensing societies.**

FACT: H.R. 789 is basic consumer protection legislation that would relieve onerous, expensive and unnecessary burdens imposed by the current system on small business.

H.R. 789 would require the licensing societies to:

- provide music consumers easy on-line access to lists of the songs licensed by each society;
- provide consumer information that ensures price equity for small business establishments;
- resolve local licensing disputes through local arbitration, not in New York City;
- offer radio broadcasters limited use licenses at rates that reflect the amount of music actually used;
- respect agreements between lessors and lessees regarding music licensing liability.

H.R. 789 also would require the Justice Department, as the only party empowered to bring compliance issues to the attention of the "rate court," to report annually to Congress regarding its oversight of the ASCAP and BMI consent decrees.

# A marching band plays a song during halftime of a nationally-televised football game.

## Quick, how many times should the music licensing societies (ASCAP/BMI/SESAC) be paid?

If you said once, you're wrong.
If you said twice, come on, don't be a cheapskate!
If you said three times, where's your sense of greed?

The correct answer, according to the music licensing societies, is that they should be paid **five times** for the rights to the **one** playing of the song.

You may be wondering if it's too late to change careers, but here's how the music licensing societies arrive at their convoluted sense of math and ethics:

- First, **the stadium pays** a music licensing society to use the song played by the marching band.
- Then, **the national TV network pays** to broadcast the song.
- Next, **the local TV station pays** to broadcast the song.
- Then, **the local cable system pays** for the song again.

(Wait, it's not over yet)

Finally, a **restaurant pays** for airing the song on its TV.

It's a scam. That's why restaurant owners are supporting legislation (S.1137 & H.R.789) to allow businesses to play "incidental" or background music on radios or TVs without paying licensing fees. Fees would still apply for playing compact discs, tapes and live music.

The National Restaurant Association is sponsoring this message because we believe everyone should be paid **fairly** for their work.

**Greater Southern Country Music Assn.**
**Office of the Representative-at-Large**
**6104 Chimney Rock**
**Killeen, TX 76542**

Hon. Jan Meyers-Chmn
House Small Business Committee
Washington, D.C. 20515

Dear Congresswoman Meyers: May 2, 1996

G.S.C.M.A. represents over 2000 member/songwriters/recording artists/publishers and over 800 radio stations, both Country and Gospel/Christian/Religious in the United States and Europe. As the Rep. at Large, I am writing on behalf of our members to support the investigations against ASCAP and the allegations of the National Restaurant Association and the Religious Broadcasters Association.

Many of our members are also ASCAP members as songwriters and/or publishers. Our members' records are distributed to our member radio stations who return monthly or weekly playlists to our magazine office in Florida to be compiled into our monthly charts in Country and Christian music for both the USA and Europe. In all, there are those four charts in each magazine, published monthly or bi-monthly for the past eight years.

Our members are also performers in restaurants, clubs, hotels, resorts, and churches in both the USA and Europe. Hence, our affiliation with the National Restaurant Association and the Religious Broadcasters.

What we wish to show to the committee is that as both ASCAP members and songwriters/publishers/artists/composers; we are supposed to be receiving the royalties that ASCAP so diligently collects from the restaurants and radio stations-**But we don't get any money at all!**

ASCAP collects these royalties under the false pretenses that they are fairly distributing these moneys to us-the writers and publishers whose works are being performed. They sign us up as members under the outright fraud that they will collect our royalties and distribute them to us. In fact, ASCAP does neither. There is a clique in Tin Pan Alley, Nashville, and L.A. that gets the lion's share of the funds, while our members get totally defrauded.

Last year, I had as many as nine songs listed on the G.S.C.M.A. charts at one time, and two on the Europe and USA charts for 15 and 21 months each. My ASCAP checks? **Zero!** My publisher, with over 4000 gold records, several dozen artists, and consistently at least 20 people on the charts at each issue? His ASCAP checks-**Zero!** Why? Only a small fraction of the FCC licensed radio stations are surveyed by ASCAP. They refuse to survey our member stations or the Restaurants to see what they are playing, so that they can keep the moneys collected in the hands of their inside clique. After 1995's Congressional action, they sent all members the attached 'Member Extension Agreement' requiring us to rubber-stamp the fraud or lose our memberships.

I filed complaints with FBI offices in both Austin, Texas and New York City. Both offices consulted with the local US Attorney's offices and refused to investigate ASCAP. You don't suppose there was too much pay-ola going on, do you? I complained to Janet Reno's office. Her letter is on file in Cong. Chet Edward's Belton, Texas with my spring 1995 detailed complaint in this matter. Janet Reno refused to investigate **the largest annual monetary fraud in the History of the United States-ASCAP!** There own member financial statements reveals that they took in 1/3 of a billion dollars annually from the US alone! Small wonder that they can afford a huge highrise in New York City,LA, and Nashville, and to openly buy US attorneys, Federal Judges in the Southern District of New York, and the FBI.

On behalf of our GSCMA members, please take this fraud and conspiracy to commit fraud totally out of business. Please stop the Congressional sponsorship of this fraud. Quit looking the other way, as Congress has for the past five decades, and re-invent this wheel. It's totally corrupt and decades beyond repair.

May I remind you that I am also a state delegate to the party convention, and that it is an election year.

Your prompt action is required.

Sincerely,

Dennis D. Sowell

# Ascap Alert 98

By

Dennis D. Sowell-G.S.C.M.A. Rep. at Large

Today, I received ASCAP's April 22 Member's 'Action Alert' letter, bearing the signature of Marilyn Bergman, Chmn of the Board. The letter calls members to action regarding Congressional Bills: H.R. 989 and 709, together with Senate bills: S. 1137, 1620, and 483. H.R.989 and S.483 are extension of copyright bills to give copyright coverage for the life of the author/composer plus 70 years. Hence their nicknames: "Life Plus 70".

The other three bills, 1137, 1628 and 789, are remnants and rehashings of 1995's business from both the National Restaurant Association and the National Religious Broadcasters. Both organizations are wanting ASCAP out of the picture for years of fraud, mis-distribution of funds, and gestapo-like tactics. Both organizations have large-scale support from defrauddd ASCAP member/composers/publishers themselves! (myself included) You may recall the Congressional hearings in May of 1995 with the National Restaurant Assoc.

The problem at hand is that many ASCAP composer members are also performers at many of the restaurants. The restaurant owners have heard our songs on the local radio stations, seen us perform every week for years, paid the ASCAP license, never had their restaurant surveyed to see what songs were paid (fact is, ASCAP has never had any intention of fairly distributing the royalties collected), and never seen their performer/member/composers/artists paid any of the royalties collected. **Hence the fraud!**

The religious broadcasters have the same scenario to report in the church scene. The same artists on the radio, are the same artists playing the youth concerts and the local churches, and **aren't getting paid**, though ASCAP never misses collecting a royalty or license fee. **Hence the fraud!**

Now, back to ASCAP. As usual, they want the members to storm Congress with calls and letters wanting Life Plus 70 approved, and everything else defeated. Problem is, only a small part of the membership is in the pay clique. The rest of the members fully support the move to take ASCAP totally out of business and re-invent the wheel, when it comes to royalty distribution. The Restaurant and Religious Broadcasters would fully support ASCAP if the artists/members/composers (and their own associates who are ASCAP members) were being fairly paid. The entire basis of their complaints is: why must we be forced to sponsor this fraud!?

ASCAP even responded to the 1995 Congressional hearings and legislation by amending their member agreements to the effect: All members must accept the ASCAP board decisions regarding distribution of royalties, **or they can't be members at all!** We were all given until January 1, 1996 to **rubber stamp the fraud, or lose our memberships!** It was very clear Sign ASCAP's carte blanche, or you're outa here!

As Representative at Large, I called them and told them. Pay our members (G.S.C.M.A.), or I'll publish it and tell the members to call and write their Congressmen, **as ASCAP members**, and fully support the opposing legislation. If they can't do business fairly, and fifty years of experience proves that they can't and won't; then Congress, **take them out of business!**

Bottom line is, when I tell them I'll do something if they don't get their act honest, you can put it in the bank. I'll publish it for all the world to see, and here it is! Sic 'em folks!

IHRSA
263 Summer Street
Boston, MA 02210
(617) 951-0055
(800) 228-4772
Fax (617) 951-0056

May 7, 1996

Honorable Jan Meyers
House Small Business Committee
2361 RHOB
Washington, D.C.

Dear Chairman Meyers:

The International Health, Racquet & Sportsclub Association (IHRSA) urges you to support H.R. 789, the Fairness in Music Licensing Act. This legislation will provide fair protection for health clubs, restaurants, retailers and other mainstream American small businesses against the arbitrary pricing, discriminatory enforcement and abusive collection practices of music licensing organizations.

The harassment and abuse which our small businesses receive from music licensing organizations such as ASCAP (The American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.) and SESAC, Inc. has been a serious problem affecting health club operators for many years.

IHRSA
International Health, Racquet & Sportsclub Association

*Committed to the Profitability and Professionalism of Our Member Clubs*

The Fairness in Music Licensing Act of 1995 exempts small business establishments like ours from paying licensing fees on purely incidental background music. It breaks the monopoly power which music licensing organizations have to set arbitrary fees and threaten costly lawsuits against those who do not comply. It establishes local third-party arbitration procedures for handling disputes and for determining reasonable fees, and it requires licensing groups to identify, on-line and in print, the music they represent so that users can have access to full "product information." Currently, users do not have this information available to them.

Don't be fooled into thinking that the so-called compromise between the National Licensed Beverage Association (NLBA) and BMI and ASCAP does anything to solve the problems faced by health club operators. Under current law, as affirmed by recent Supreme Court decisions, small businesses are already exempt from paying copyright fees under the homestyle exemption for playing the radio as background music. Why is the NLBA agreement necessary? Also, the NLBA agreement is silent on one of the fundamental provisions of H.R. 789, the right to arbitrate unjust fees. Arbitration is the only way small businesses like health clubs could ever afford to fight unjust copyright fees.

H.R.789 is not about cutting the royalties of songwriters. It is about the way in which ASCAP, BMI and SESAC operate and about long overdue changes that will make the system fairer for all music lovers.

I urge you to support H.R. 789. In doing so, you will create a more level playing field -- and a better chance for survival -- for hundreds of thousands of small business establishments, including health and fitness clubs throughout the country.

Sincerely yours,

John McCarthy
Executive Director

COLORADO LICENSED BEVERAGE ASSOCIATION

1155 SOUTH HAVANA • SUITE 11-322 • AURORA, COLORADO 80012
Telephone (303)369-4147 Fax (303)369-4135

May 6, 1996

The Honorable Jan Meyers
Fax Number (202)225-0554

Dear Congresswoman Meyers:

As Executive Director of the Colorado Licensed Beverage Association, I applaud and thank you for holding a long overdo hearing regarding the practices of the music licensing societies.

The Colorado Licensed Beverage Association strongly favors the efforts of the National Association of Beverage Retailers and other members of the Business Coalition in there efforts to bring about a livable business environment with the licensing societies.

The unregulated practices of these societies have historically been arbitrary, usually unreasonable, strong arm, and harassing. Even when the societies are proven wrong, there is seldom if ever, recourse for the small business owner under the current regulations.

If the Colorado Licensed Beverage Association can be of any assistance to you please feel free to contact me at (303)369-4147.

Sincerely yours,

Lynn A. Hopwood
Executive Director

cc: The Honorable John LaFalce
The Honorable James F. Sensenbrenner
The Honorable Joel Hefley

# WHY PASSING THE FAIRNESS IN MUSICAL LICENSING ACT IS THE RIGHT THING TO DO

"The Fairness in Musical Licensing Act"—which nearly 170 U.S. Representatives are now cosponsoring—guarantees a fair shake for businesses that must pay music licensing fees to ASCAP, BMI and SESAC. Music licensing organizations wield monopoly-like power in setting and collecting their fees—and know they can count on lawsuit threats to get businesses to fall in line. The straightforward changes in H.R. 789 make the law fairer, simpler and more equitable.

### WHY H.R. 789? Because businesses should be exempt from licensing fees for incidental radio and TV music.

H.R. 789 says businesses that switch on a radio or TV in the background—and that don't charge customers to hear the transmission—shouldn't have to pay licensing fees.

This updates a 20-year-old "homestyle" exemption for radio and TV music that everyone agrees is outdated and confusing.

It also ends "double dipping" by licensors. ASCAP, BMI and SESAC are now charging restaurants, retailers and other small businesses millions of dollars in licensing fees for background music even though radio and TV stations already pay huge licensing fees.

### WHY H.R. 789? Because there's no practical legal mechanism for disputing fees today.

Any small business that doesn't fall in line with the fees the music licensors demand has just one option today: To go up against ASCAP and BMI lawyers in a New York City courtroom. That's the single federal court in the U.S. authorized to handle these disputes. Small businesses can't afford to do it.

H.R. 789 proposes a third-party arbitration system to resolve disputes and determine fair and reasonable fees in a quicker, less costly manner.

### WHY H.R. 789? Because music licensors don't provide information on their product.

Businesses have the right to know what they're paying for when they sign a licensing agreement with ASCAP, BMI or SESAC. H.R. 789 requires music licensors to provide easy on-line and paper access to lists of the songs they represent. That gives businesses the option of limiting their music to one society's repertoire.

### WHY H.R. 789? Because only Congress can pass the necessary changes.

Over the past two years 16 states have passed consumer-protection laws guaranteeing businesses more equitable treatment from ASCAP, BMI and SESAC.

But only the U.S. Congress can make the most fundamental changes. No state can authorize arbitration. No state can update copyright law to provide a clear exemption for background radio and TV music. It's time for the U.S. Congress to act.

### WHY H.R. 789? Because it makes the system fairer for everyone.

No one's trying to get out of paying appropriate licensing fees or denying songwriters their just royalties. H.R. 789 is about structural changes that will make the system fairer for everyone. That means more compliance, less litigation, and better relations between the music licensing organizations and the small businesses who are their customers.

National Restaurant Association ■ Washington, DC ■ 202/331-5900

Wall Street Journal June 26, 1996

# You Play, You Pay

By Perry Moy

Allow me to introduce myself. I am a pirate. No, not the sea-going kind. I steal music.

There's no vessel, festooned with flags. Just a small Chinese restaurant I've run since 1964. We do not fire cannons. We fire woks. And the men who threatened me with a lawsuit weren't wearing uniforms at all. They were wearing Bermuda shorts. We'll call them "Sam" and "Dave."

I noticed them one morning before lunch. They walked right past the "Please Wait for Hostess" sign and proceeded to inspect the place, top to bottom, like they owned it. Since I thought I owned it, I asked them, as politely as I could under the circumstances, if I could help.

"No, just a minute," said Sam, waving me off. "Those are speakers," Dave announced a few long minutes later, pointing at my ceiling tiles.

Indeed they were speakers, six tiny round things wired to my stereo, piping background music into a dining room that seats 80 customers when full. What of it? "You owe us $250, cash or check," Sam informed me. What for? "The music you're playing," he said. And if I didn't pay, I would be sued for thousands by something called "BMI."

I had no idea what BMI was. And in the course of our rather fractious conversation, Sam and Dave never explained it to me or showed me any identification. I never learned their real names. But I have learned, in the years since I threw them out, a thing or two about their business: It's run like a classic protection racket.

BMI (or Broadcast Music Inc.), like its larger competitor, ASCAP (the American Society of Composers, Authors and Publishers), collects music licensing fees on behalf of the songwriters in its particular stable. Federal copyright law works as follows: When you buy a compact disk, a portion of the price goes to the composers. Before a radio or television station can broadcast music on the CDs it has purchased, it must pay additional licensing fees to BMI and ASCAP, whose annual revenues exceed $800 million.

And there's the kicker. If a restaurant or other small business like mine keeps its radio or television on during working hours, it's supposed to pay BMI and ASCAP, too—a second time at the trough for the same recording. The theory is that we are conducting a copyright-protected "public performance" of the music. And with very limited exceptions that are never written down and explained to us, every conceivable piece of background music counts. Including advertising jingles that run during football games on a bar's TV, or the almost inaudible tunes that play on some restaurants' telephone answering machines.

How much are we supposed to pay? Good question. The agencies claim to base their (very different) rate schedules on complicated formulas involving the size of TV screens and the number of customers. But those formulas, too, are unwritten. We're simply told what to pay when Sam and Dave come by for a visit. I know a guy who has a place a few blocks from me. It's not much larger than mine. They charge him six times what they "quoted" me.

Don't like the price they're asking? Tough. The only thing you can do is file a claim in federal court in New York City, where jurisdiction over ASCAP and BMI has been held since the 1950s. You might feel better, but it'll cost you vastly more in time and legal bills than you'll ever get back in reduced fees—if you win.

Maybe you want to deal with just one licensing agency, not both, and you're determined to avoid copyright infringements on the other agency's catalog of songs. Good luck. Disk jockeys don't generally announce who licenses the song they're about to play. And the agencies don't announce it, either. Next time they come by your restaurant, try asking Sam and Dave for a list of the music they're demanding you buy. They don't have one.

Word of this scam has finally reached the government. Rep. Jim Sensenbrenner (R., Wis.) has introduced legislation to exempt small businesses that use purely incidental background music from copyright licensing obligations. He would establish a local third-party arbitration system for resolution of billing disputes. He would require BMI and ASCAP to make available to the public full information about their respective repertoires of music. And the agencies' too often abusive and arbitrary contract and collection practices are also under legislative consideration in almost 20 states.

For some reason I never heard back from Sam and Dave. Maybe my eye patch and wooden leg frightened them off.

---

*Mr. Moy is the owner of the Plum Garden Restaurant in McHenry, Ill.*

# Music Licensing Fairness Coalition

American Dental Association
American Greyhound Track Operators Association
American Horse Council
American Society of Association Executives
Bowling Proprietor's Association of America
Circuit City Stores, Inc.
Club Managers Association
Electronic Industries Association
Hair Cuttery, Inc.
International Association of Amusement Parks and Attractions
International Association of Auditorium Managers
International Association of Exposition Management
International Council of Shopping Centers
International Health, Racquet and Sportsclub Association
International Mass Retail Association
International Planned Music Association
Laurel Park
Muzak
National Association of Beverage Retailers
National Association of Retail Druggists
National Association of Home Builders
National Automobile Dealers Association
National Federation of Independent Business
National Religious Broadcasters Music License Committee
National Restaurant Association
National Retail Federation
National Retail Hardware Association
National Shoe Retailers Association
North American Retail Dealers Association
Passenger Vessel Association
Pimlico Race Course
Society of American Florists
The BSG Company

# Music Licensing Fairness Coalition

**THE FAIRNESS IN MUSICAL LICENSING ACT OF 1995**
**H.R 789**

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MUSIC LICENSING ANECDOTAL INFORMATION

Health Clubs

**Colorado**
A health club owner in Boulder, Colorado plays the local radio station throughout her club and pays ASCAP. BMI sent an employee of theirs to her club to work-out and during a five hour period recorded 9 BMI songs coming over the radio. BMI not only demanded $500 for the year's fee, but demanded three years in arrears totalling $2000. BMI took the club to court and won with the health club owing $6000 -- just for using the radio and music which had already been paid for.

**Vermont**
A health club owner in Montpelier, VT notified BMI that he was cancelling his contract because he was only using CDs registered through ASCAP. He continued to receive threatening notices and phone calls from BMI and their attorneys demanding payment even though he was no longer using their music. It was not until the Vermont Attorney General's office got involved that BMI relented.

**Rhode Island**
A Rhode Island health club operator plays music in her club and pays the music licensing societies. In an attempt to lower her bill from the societies, she disconnected a number of speakers throughout her club (technically this should lower one's bill tremendously). To her amazement, her fees went up instead of being reduced.

Horse Race Tracks

**Maryland**

ASCAP and BMI sought contracts from the Maryland Jockey Club's two thoroughbred racetracks at per diem rates that could produce bills exceeding $20,000 the first year, even though music ceased playing an hour before post, well before the bulk of attendance arrives. Second and third year fee increases would raise the annual fees to $22,800 and $25,200, respectively. The astronomical fees substantially exceeded any value of the music so it was stopped. ASCAP refused to pro rate the per diem fee proportionately to the hours the music was actually played. ASCAP next claimed the same fees were owed for the tracks' box seat and dinning room closes circut television system. ASCAP's theory was the television monitors, pre-tuned to in-house racing, could access commercial television shows or commercials which speculatively might contain incidental background music ASCAP acquired rights to. Weekend patrons enjoy sports broadcasts between races. The sports programming has value but the incidental background music does not. ASCAP refused to base fees on a percentage of box seats and dinning room attendance, which would the people who hear ASCAPs incidental background music. This is another example of ASCAP expansively interpreting copyright law to their greatest financial benefit to a ridiculous scope far beyond copyright law's purpose.

RESTAURANTS

In Pennsylvania an operator has televisions and plays tapes for background music. His fee was $300. He switched to MUZAK for background music and his fee went up! His new fee is $500 for just the televisions. The licensing group claims that they weren't charging him for all televisions before.

An owner in California preparing to open a restaurant was contacted by a BMI agent. He was not open yet but the agent wanted him to sign a contract. He asked the BMI agent to mail him a contract and any other necessary forms. BMI never sent anything. BMI successfully sued and the owner was given such a high fee to pay, the judge cut it in half to save the business from going under.

A gentleman in California owns a small cafe with 45 seats, has live music 2-4 nights a week on a seasonal basis (3 or 4 months a year). The smallest contract ASCAP would offer was for 75 seats and six months a year. After complaining to the ASCAP agent, he wrote the Rate Committee in New York. An ASCAP lawyer replied, explaining they would sue if he refused to sign the contract, but never addressed his specific contractual concerns.

A woman in Arizona uses a jukebox and 13 televisions. She sent a signed contract to BMI with a check for $320. BMI received the check but not the contract and advised her to sign a new contract. She was concerned about signing another contract for fear she would be billed twice. About two weeks ago her BMI agent came back in and "threw a temper tantrum" during business hours. He yelled at her and her mother (who was present) saying they had better sign the contract. He yelled so loud, he upset several customers. He also said if she didn't sign another contract, BMI was going to have the "federal marshals" come in and take her jukebox and televisions!

A Colorado operator uses radio and televisions. He was under a one-year contract with BMI (which cost him $195) when ASCAP representatives offered him a one-year contract for $912. The ASCAP agent did not explain why their rates were $700 higher than BMI's, but did offer to cut a special "discount" rate of $729 if he paid by the end of the month. After allowing the National Restaurant Association to publish his story the owner was contacted by ASCAP and offered a lower fee closer to BMI's fee. Although this is better for the operator, it is a violation of ASCAP's consent decree with the Department of Justice.

A catering hall owner in Maryland lets dance instructors hold classes in his establishment one night a week, for which the instructors pay ASCAP a $300 fee in order to play music for the lessons. The owner of the hall sells food and drinks to the dancers, which has prompted ASCAP to bill the owner for $880, $580 more than the dance instructors paid for the same music and broadcast system. ASCAP claims that since the caterer is selling food and drinks to the dance students, his business is directly benefitting from the music.

A club owner in New Hampshire had a one year contract for approximately $2400 with ASCAP. Within a year, he was approached by BMI who claimed he needed to be licensed with them, Based on his club's seating capacity and average ticket price, BMI determined the club owed them $7600 in fees a year, over $5000 more! The owner refused to pay BMI more than three times what he paid ASCAP. BMI responded by threatening to sue.

A restaurateur in New Jersey refused to sign a contract until his ASCAP agent showed him what he was paying for. He asked for a list of songs ASCAP represented but they refused to provide him with one. After not receiving a list, the owner still refused to pay any fees. An ASCAP investigator was sent into his restaurant and heard a piano player play four ASCAP songs. The music licensing agency then filed suit asking for damages of $25,000 per song and legal fees. His lawyers told him that going to court could cost upwards of $75,000. ASCAP eventually agreed to settle the case for approximately $8000.

Writer's Direct Dial
202-828-2213

DICKSTEIN SHAPIRO & MORIN L.L.P.

May 7, 1996

VIA COURIER

The Honorable Jan Meyers
Chair, Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

Re: Music Licensing

Dear Chairwoman Meyers:

On behalf of my client, the American Greyhound Track Operators Association ("AGTOA"), I would like to commend you for convening tomorrow's committee hearing on music licensing and its effect on small businesses nationwide.

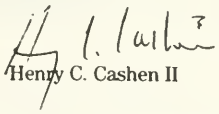
Legislation to reform music licensing practices is very important to the greyhound racing industry. As AGTOA member tracks face growing competition from other segments of the gaming and entertainment industry, they can ill-afford to pay the music licensing monopolies' excessive fees, which are often levied against tracks for music broadcast during commercials on clubhouse televisions. For this reason, AGTOA has been a charter member of the Music Licensing Fairness Coalition and a veteran participant in the lengthy negotiations between the Coalition and the music licensing societies (ASCAP, BMI, and SESAC).

Legislation currently pending in the Senate would go a long way toward relieving greyhound tracks and other businesses from the more onerous demands of the music licensing societies. H.R. 789, sponsored by Rep James Sensenbrenner, would end the societies' practice of charging businesses like greyhound tracks for the "incidental" use of music, including for music broadcast by television. This legislation is therefore superior to other solutions to the music licensing problem, especially the private deal worked out between the societies and the National Licensed Beverage Association. That agreement ties music licensing fees to the size of a business and number of receivers. Such limitations are unfair to greyhound tracks, whose businesses are large in size but small in nature. AGTOA supports H.R. 789 and urges you to do the same in order to protect small businesses nationwide from the unfair practices of the music licensing societies.

Once again, we appreciate your interest in music licensing, and we pledge our support to you in any efforts by the Committee to bring a fair and equitable legislative resolution to

this difficult issue. If you have any questions about AGTOA's interest in music licensing, or about the industry in general, please call me at the number listed above. Many thanks.

Sincerely yours,



Henry C. Cashen II

NLBA
National Licensed Beverage Association

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TAM
Techniques of Alcohol Management

*Debra A. Leach*
*Executive Director*

May 8, 1996

Rep. Jan Meyers (R-KS), Chair
Small Business Committee
House of Representatives
RHOB 2361
Washington, D. C. 20515

Dear Congresswoman Meyers:

As the executive director of the Empire State Restaurant and Tavern Association and the chairman of the National Licensed Beverage Association's Government Affairs Committee, I am submitting the following written testimony in lieu of not being able to appear personally as a witness before the House Small Business Committee to testify on the issue of music licensing legislation that affects our members.

If I had been permitted to testify, I would have presented the enclosed testimony on behalf of the National Licensed Beverage Association, which represents restaurants, taverns, retail liquor stores and other retail establishments in the hospitality industry that serve alcohol beverages and the majority of the thousands of licensees who sell food and beverages nationwide. Please include this letter and my statement in the final record of the hearing.

Thank you for your consideration.

Sincerely yours,

Scott Wexler, Chairman
Government Affairs Committee

Enclosure

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National Licensed Beverage Association
Debra A. Leach
Executive Director

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TAM
Techniques of Alcohol Management

STATEMENT OF SCOTT WEXLER ON BEHALF OF THE

NATIONAL LICENSED BEVERAGE ASSOCIATION

BEFORE THE HOUSE SMALL BUSINESS COMMITTEE

ON MUSIC LICENSING ISSUES

May 8, 1996

Madam Chairman and members of the committee, I am Scott Wexler, the executive director of the Empire State Restaurant and Tavern Association and the chairman of the National Licensed Beverage Association's Government Affairs Committee. I appreciate the opportunity to testify before the House Small Business Committee on the issue of music copyright law and the affect of music licensing on small business operations.

It is no secret that the NLBA holds a position on this issue that is different from that of the groups that appeared before the committee. For the first time since 1976, our organization has convinced the performing rights organizations that bars, taverns, restaurants, food and beverage establishments and small retail stores should not have to pay fees for the use of televisions and radios, provided they conform to certain requirements. This is a major breakthrough that benefits, in our judgment, well over 75% of the food and beverage outlets around the country. It is a breakthrough commitment from the performing rights organizations to support a legislative

change to the music copyright law when before they had refused to discuss legislation. It is a breakthrough for small retail operations that would save thousands of dollars today if this legislation were presented to the president for his signature into law.

We strongly believe that one cannot negotiate with oneself and, for the last year, many groups in Washington, including some at today's hearing, have supported three or four bills and a variety of proposals, all of which were unacceptable in one way or another to the performing rights organizations. The NLBA recognized many years ago that the issue the committee is addressing today on the impact of music licensing fees on small businesses was a major problem for our members. In fact, in the fall of 1993, working with former Rep. Craig Thomas (R-WY), now Senator Thomas, the NLBA secured introduction of H. R. 3288, the Public Accommodations Exception Act (a copy of which is attached to my testimony), which sought to exempt restaurants, taverns and other retail establishments that serve food and beverages from paying music licensing fees. We were alone in 1993 on this legislation, but we strongly believed in this issue. Now, Madam Chairman, three years later, a solution to this issue is in sight and, in the spirit of compromise and negotiation, we have reached what we think is a fair and equitable solution.

Included in the 1976 music copyright law is a provision to exempt retail establishments, such as restaurants, taverns and retail stores, from paying music licensing fees to the performing rights societies (ASCAP, BMI and SESAC) for use of televisions and radios when the equipment used is similar to that used in homes, provided no charge is made. This provision is known as the

"homestyle exemption." For the past 20 years, the misinterpretation of this provision by the performing rights societies has resulted in retail establishments paying unfair music licensing fees. Each of the three performing rights societies has a different interpretation of the size of the television screen and the number of radio or television speakers permitted without the payment of a music licensing fee. The National Licensed Beverage Association has consistently urged Congress to address the need to clarify the homestyle exemption provision in the U. S. copyright law. After nearly three years of a legislative stalemate, in October 1995, the NLBA met with representatives of ASCAP, BMI and SESAC, at the suggestion of many members of Congress, in an effort to resolve these difficulties and clarify the homestyle provision in the 20-year-old copyright law as it relates to the homestyle exemption. A compromise was reached on legislative language to amend the music copyright law as it relates to the homestyle exemption. While this compromise amendment does not satisfy all sectors of our industry, it will cover the vast majority of hospitality establishments. The provisions of the homestyle exemption include:

- A complete exemption from music licensing fees for use of television and radio broadcasts by eating and drinking establishments with less than 3,500 square feet of space.
- Depending on layout, larger establishments may have up to three televisions with screen size up to 55 inches and up to six radio or television speakers free of licensing fees.

- Off-premise and other retail stores with less than 1,500 square feet will be completely exempt from television and radio license fees.
- Larger stores may have up to two 55-inch televisions and up to four radio or television speakers free of license fees.
- Businesses with more speakers, more or larger televisions, or other music uses would still pay licensing fees.

Our members want to achieve an equitable change to music copyright law, and Congress can provide such relief. Attached to my testimony is the legislative language proposed. The name of the legislation is the Small Business Music Licensing Exemption Act. Exemptions for copyright are occasionally provided for by Congress and rarely is the entire music copyright law changed to the extent proposed by others testifying today. The 1976 copyright law provides for exemptions from the payment of music licensing fees for private clubs, fraternal and veterans organizations, schools and summer camps, to name a few. Our proposed exemption is not a radical change and conforms to congressional efforts to limit and narrowly define exemptions in the music copyright area. If our proposed legislation is signed into law, retailers would still be required to pay the performing rights organizations for live performances, jukebox music, all music transmitted on televisions and radios when a direct charge is made to see or hear it, and all other uses not covered under the exemption.

Finally, I do not believe that it will be productive in my testimony to detail all the efforts our organization made last year with other groups to arrive at a realistic solution to this problem.

But there has been a great deal of misinformation distributed to members of the House and Senate on this issue, some by organizations represented here today. A bill recently introduced by Sen. Hank Brown (R-CO), S. 1628, the Fairness in Musical Licensing Act, is not supported by the performing rights organizations. It is not a compromise bill, and we do not support its provisions. It is merely a third version of previous legislation, moving in the direction that we have already agreed to with the performing rights organizations.

We know that the issue of music licensing copyright law is complex. Unfortunately, unless a compromise is brought forward addressing everyone's concerns, such as we've proposed, the result will be that no bill will pass. That would be disastrous for the small business community.

The Honorable Jan Meyers
Chairwoman, House Small Business Committee
2261 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairwoman Meyers,

On behalf of its members, our national association, the National Association of Beverage Retailers (NABR), has been working to further the efforts by Congressman Sensenbrenner (WI) to enact Music Licensing legislation and to support his attempt to level the playing field for small business owners.

NABR is part of the Music Licensing Fairness Coalition which is comprised of many associations working together to support the efforts by Congressman Sensenbrenner to resolve an issue that affects many small businesses. The coalition reflects a tremendous effort toward compromise in the best interest of small retailers across the nation.

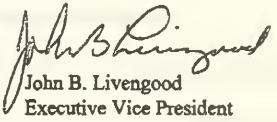
As represented by the coalition, we believe a comprehensive package would include provisions which address an exemption for radio and TV broadcasts, complete access to the societies' music lists and a provision which addresses arbitration.

You may be aware of a proposed compromise initiated by the National Licensed Beverage Association (NLBA). While the NLBA has the right to pursue its own legislative agenda outside of the coalition, Representative Sensenbrenner's legislation meets the more comprehensive approach which we feel is in the best interest of the beverage industry. The legislation includes a regional or local arbitration system where disputes may be settled locally rather than in New York where the travel costs remain unaffordable for the large majority of our retailers. The Congressman's legislation also addresses a most elemental point, the opportunity for the retailer to see what they are paying for. Access to the song lists has been a basic premise in sixteen states which have passed music licensing legislation, including Indiana, and is accurately represented in Congressman Sensenbrenner's legislation.

As an officer of a state association whose members are directly impacted by the injustices brought about by the unregulated practices of the music licensing societies I believe the time has come for fair and logical legislation to be enacted. That view is supported by 170 Representatives who have cosponsored the bill. Indiana cosponsors include Representative Souder, Representative Visclosky, Representative Burton and Representative Jacobs.

We thank Congressman Sensenbrenner for introducing the legislation and applaud your decision to hold a hearing on the issue. The Indiana Association of Beverage Retailers, represented by the National Association of Beverage Retailers, stands willing to assist you in any way.

Sincerely,



John B. Livengood
Executive Vice President

cc: The Honorable Dan Burton
The Honorable Andy Jacobs
The Honorable John J. LaFalce
The Honorable James F. Sensenbrenner
The Honroable Mark Edward Souder
The Honorable Peter Visclosky

NATIONAL FOOTBALL LEAGUE

STATEMENT OF THE NATIONAL
FOOTBALL LEAGUE ON H.R. 789

The National Football League submits this statement to express the League's concerns about the potential adverse effects of H.R. 789 on its television arrangements.

The NFL's Television Plan

The NFL has traditionally made available on free broadcast television a greater percentage of its regular season games than any other major professional sports league.

For three-and-a-half decades every single regular season NFL game has been televised on at least a regional basis, and fans in each television market now have available to them broadcasts of at least three or four games (of a maximum 15 games played) each week. On Sunday afternoons during the 1996 regular season, two or three NFL games will be broadcast live by Fox and NBC in every market in the country. In addition, for the 27th consecutive year, ABC will be televising nationally a prime time game each Monday night. (There is also a weekly national prime time game on cable networks ESPN or TNT, usually on Sunday nights.)

Starting in 1994, the NFL expanded the availability of NFL game telecasts. As a supplement to and without disturbing the telecast schedule outlined above, the League now makes available to residential and commercial satellite dish

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antenna owners a package of all regular season Sunday afternoon games telecast by Fox and NBC (with the exception of games not shown in a local area pursuant to the NFL's blackout rule). Subscribers to this package thus have access to games that otherwise would be unavailable to them because they are broadcast only in other markets (for example, Buffalo Bills fans in Florida now can watch every Bills game even though only a few would be broadcast locally). The package is marketed under the name "NFL Sunday Ticket™;" in 1995, the highest rate for a residential subscription was $139; commercial establishments with a fire occupancy code of 500 or less paid between $399 and $1,899, depending on size.

The Blackout Rule

As noted, the specific games to be televised in a particular market are subject to the NFL's blackout rule. The rule, which is included in each of the League's television contracts, prohibits televising within a club's home territory home games not sold out 72 hours in advance of game time unless the participating clubs agree otherwise. The League has had a blackout rule since at least the early 1950s.

The NFL's blackout rule twice has been approved by Congress. In the Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 15 U.S.C. §§ 1291-95, Congress expressly allowed the League to black out all games when the home team is playing at home. Twelve years later, in response to concerns about the blacking out of home games regardless of whether the games were sold out, Congress enacted special blackout legislation for the 1973-1975 seasons that prohibited blackouts of home games sold out

72 hours in advance. Pub. L. No. 93-107, 87 Stat. 350 (1973). The law was not extended in light of the NFL's commitment to Congress to abide by its terms in the future, 122 Cong. Record 11286 (Apr. 27, 1976), and the League continues to honor that commitment to this day.

NFL Copyright Litigation

The unauthorized public performance of games that are blacked out locally has been the focal point of the League's efforts over the years to police infringement of its copyright in NFL game telecasts. Since the early 1980s, the League has vigorously enforced its rights against infringing commercial establishments in federal courts across the country -- each time obtaining a declaration as to the validity of the NFL's copyright and a permanent injunction against the infringing conduct.[1/] In the last two years alone, the League has brought 25 such lawsuits in 15 different jurisdictions against approximately 200 establishments.

In the great majority of these cases, the establishments were able to receive NFL games by unlawfully intercepting satellite signals with the aid of unauthorized decoder boxes. As an example, a number of Miami establishments used decoder boxes registered in the Chicago area to receive and to show to their patrons Miami Dolphins home games that were not sold out and therefore not televised -- and not available to properly authorized NFL Sunday Ticket™ subscribers -- in the Miami

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1/ See, e.g., National Football League v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986); National Football League v. Rondor, Inc., 840 F. Supp. 1160 (N.D. Ohio 1993).

area. Many others have used decoder boxes registered for residential use (at a lower cost) to show the full menu of NFL Sunday Ticket™ telecasts in their establishments.

H.R. 789

H.R. 789 proposes to amend the Copyright Act to provide for "fairness in musical licensing." It does so principally by fundamentally altering the terms of the so-called "home-system exemption" to the Copyright Act, set forth at 17 U.S.C. § 110(5).

If the scope of H.R. 789 were in fact limited to "fairness in musical licensing," the NFL would have no objection. The League does not oppose any legislation that simply deals with an exemption for small businesses from potential liability under the Copyright Act for the incidental performance of music on television or radio.

The language of Section 2 of H.R. 789, however, would amend the home system exemption with respect to all aspects of television and radio programming -- not just music. In its current form, the exemption in certain circumstances permits the performance or display of a work using "a single receiving apparatus of a kind commonly used in private homes."[2/]

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[2/] Section 110(5) provides that the following does not constitute copyright infringement:

> Communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless --

(continued...)

By extending beyond music, Section 2 of H.R. 789 would render the NFL (as well as other sports leagues and other copyright holders) powerless to prevent most commercial establishments from taking their works without compensation. So long as an establishment did not charge specifically to see a telecast and the telecast was "incidental to the main purpose of the establishment," it would be free to televise any programming it could acquire by any means -- including using an unauthorized decoder box to intercept encrypted satellite signals. Such a result would effectively eviscerate the League's copyrights, effectively nullifying the NFL's efforts to police infringement of its game telecasts.

Fortunately, it is not difficult to amend the proposed bills to satisfy the NFL's concerns while at the same time achieving their primary purpose of clarifying the circumstances in which commercial establishments may play music without a license. Indeed, Senator Hatch has recently introduced related legislation, S. 1619, that accomplishes this precise result.

The principal virtue of S. 1619 is that it draws a sharp distinction between music and other copyrighted works. Whereas H.R. 789 would eliminate for all works the requirement of the home system exemption that reception be made "on a single

---

[2/](...continued)

> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public[.]

17 U.S.C. § 110(5).

receiving apparatus of a kind commonly used in private homes," S. 1619 amends the exemption only as to music by excepting "nondramatic musical works" from the existing statute and by creating an entirely new provision governing those works alone. S. 1619 thus would maintain the current state of copyright law with respect to television programming while at the same time addressing "fairness in musical licensing."

If you have any questions, please do not hesitate to call Neil Roman, counsel for the League, at 202-662-5695.

NATIONAL FOOTBALL LEAGUE

April 30, 1996

VERNER·LIIPFERT
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WRITER'S DIRECT DIAL
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May 2, 1996

The Honorable Jan Meyers
Chairwoman
Committee on Small Business
2361 Rayburn House Office Building
Washington, D.C. 20515-6315

Re: H.R. 789

Dear Madam Chairwoman:

I am writing on behalf of my clients, the National Basketball Association and the National Hockey League, with respect to H.R. 789, the Fairness in Musical Licensing Act of 1995, which is the subject of your hearing on May 8.

The stated purpose of H.R. 789 is to relieve small restaurants and bars from burdens placed on them by the music licensing societies. In all provisions of H.R. 789, except the amendment to Section 110 of the Copyright Act, the proposed legislation, in accordance with its stated purpose, specifically exempts payment for "non-dramatic musical works." Section 110 (5), however, would be amended to exempt payment for "a public performance or display of a work" (emphasis added), a much broader exemption than "non-dramatic musical works" only.

Sports interests, including the NBA and NHL have aggressively fought illegal piracy by commercial establishments of sports telecasts or cablecasts. The broad language of the proposed amendment to Section 110(5), however, could be raised as a potential defense in sports bar piracy actions by exempting far more what H.R. 789 is intended to exempt -- the incidental performance of "non-dramatic musical works."

In hearings before the 103d Congress, Representative Craig Thomas (R-WY) -- who had introduced a similar bill (H.R. 3288) -- told Copyright Subcommittee Chairman Hughes that his bill was not intended to provide an exemption for sports bars from piracy litigation. The NBA and NHL would urge you, in the context of your hearings, to make certain that the interpretation of the

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legislation does not cover that situation. Specifically, we suggest that the amendment to Section 110(5) of the Copyright Act be no broader than that set forth in the remainder of the bill.

The NBA and NHL would also call to your attention the enclosed copy of a letter sent to Senator Hatch, endorsing his statutory approach to resolving the problem in S. 1619.

Thanking you in advance for the consideration of our views, I am

Sincerely,

Philip R. Hochberg

enc.

cc: All Members of the Committee

05965.0999, 05981.0999

NATIONAL FOOTBALL LEAGUE

Jay Moyer
*Executive Vice President*
*& League Counsel*

April 15, 1996

The Honorable Orrin G. Hatch
Chairman
United States Senate Judiciary Committee
Washington, DC 20510-4402

**RE: S. 1619 AND RELATED PROPOSED COPYRIGHT LEGISLATION**

Dear Senator Hatch:

We are writing on behalf of the National Football League, the National Basketball Association, and the National Hockey League in support of S. 1619, a proposed amendment to the Copyright Act introduced by you last month, and in opposition to related bills introduced by other members in both the Senate and the House this past year.

As you may be aware, we have had a number of conversations with staff concerning these other copyright bills, which are apparently motivated by a desire to exempt small businesses from potential liability under the Copyright Act for the incidental performance of music on radio. We have never opposed legislation that would accomplish this purpose.

The other bills, however, have gone much farther -- to encompass all aspects of radio and television programming, not just music. Were these proposed bills to become law without amendment, sports leagues (and other copyright holders) would be powerless to prevent commercial establishments from appropriating their works without compensation. As an example, S. 1628 would allow all establishments with a viewing area of 5,000 square feet or less, as well as larger establishments using certain types of speakers, to show any programming they desired by any means -- including using an unauthorized decoder box to intercept encrypted satellite signals

The bill you introduced last month, S. 1619, suffers from no such defects. It draws a sharp distinction between music and other copyrighted works. It clarifies the circumstances in which commercial establishments may air music without a license. And it does so in a way that protects the copyrights of the sports interests in their game telecasts and other programming.

We urge you to move forward with your bill, and to oppose those bills that would deprive sports leagues and other television programming suppliers of the protections that have been afforded them under the copyright laws.

Sincerely,

Jay Moyer

**JAY MOYER**
Executive Vice President
& League Counsel
National Football League

**JEFFREY A. MISHKIN**
Executive Vice President
& Chief Legal Officer
National Basketball Association

**L. JEFFREY PASH**
Senior Vice President
& General Counsel
National Hockey League

R&E

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May 17, 1996

BY HAND

Harry Katrichis, Esq.
Counsel
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, D.C. 20515-6315

Re: Comments of SESAC, Inc. on "Music Licensing and Small Business"

Dear Harry:

It was good to speak with you this afternoon. As we discussed, enclosed are the comments of SESAC, Inc. in connection with the Committee's recent oversight hearing on "Music Licensing and Small Business." I appreciate your having confirmed that SESAC's comments will be included in the record of the Committee's hearings.

As I indicated, please let us know if we can be of any help to the members of the Committee in connection with these issues. Thank you for your assistance.

Sincerely,

Kenneth M. Kaufman

SESAC

HENRY R. KAUFMAN
SENIOR VICE PRESIDENT
GENERAL COUNSEL

May 17, 1996

The Honorable Jan Meyers
Chair, Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, D.C. 20515-6315

Re: Comments of SESAC, Inc. On "Music Licensing and Small Business"

Dear Madame Chair:

SESAC, Inc. ("SESAC") appreciates this opportunity to present the following brief comments in connection with the Committee's recent oversight hearing on the subject of "Music Licensing and Small Business."

SESAC is one of the three U.S. music performing rights organizations (PRO's) that license public performances of nondramatic musical works on behalf of songwriters and music publishers. Founded in 1930 to represent the unrepresented composer and author, SESAC was originally known as the Society of European Stage Authors and Composers, a connotation that was discontinued nearly 60 years ago as the SESAC repertory became overwhelmingly Americanized. Today SESAC represents more than 170,000 musical compositions in a comprehensive range of musical genres, including adult contemporary, black/urban, jazz, Hispanic, big band, country, gospel, dance, educational, Latin, classical, polka, rock, marching band, new age, film scores, television theme music and advertising jingles.

Unlike the two other U.S. PRO's, SESAC is a relatively small, privately owned business. The vast majority of the more than 2,500 writers and publishers that it represents are themselves small businesses. SESAC has an entrepreneurial spirit and desire to provide an innovative and competitive alternative for its affiliates and licensees, in the United States and worldwide. Just last week SESAC became the first U.S. PRO to enter into a bilateral relationship with its counterpart music licensing society, M.C.S.C., in the Peoples Republic of China. SESAC is hopeful that such new international relationships will serve the interests of its affiliates and of this country in their vitally important efforts to secure and advance respect for copyright in all those parts of the world where piracy and noncompliance with copyright has heretofore severely jeopardized the legitimate interests of creators and the creative business community.

SESAC makes no apology for its domestic efforts on behalf of its affiliates to license the copyrighted works created by its affiliates to users of music. The U.S. Constitution in its genius embodies the rights of the creators of intellectual property, including those who write music, to profit from their works. Internationally recognized standards, to which the United States adheres,

SESAC

HENRY R. KAUFMAN
SENIOR VICE PRESIDENT
GENERAL COUNSEL

May 17, 1996

The Honorable Jan Meyers
Chair, Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, D.C. 20515-6315

Re: Comments of SESAC, Inc. On "Music Licensing and Small Business"

Dear Madame Chair:

SESAC, Inc. ("SESAC") appreciates this opportunity to present the following brief comments in connection with the Committee's recent oversight hearing on the subject of "Music Licensing and Small Business."

SESAC is one of the three U.S. music performing rights organizations (PRO's) that license public performances of nondramatic musical works on behalf of songwriters and music publishers. Founded in 1930 to represent the unrepresented composer and author, SESAC was originally known as the Society of European Stage Authors and Composers, a connotation that was discontinued nearly 60 years ago as the SESAC repertory became overwhelmingly Americanized. Today SESAC represents more than 170,000 musical compositions in a comprehensive range of musical genres, including adult contemporary, black/urban, jazz, Hispanic, big band, country, gospel, dance, educational, Latin, classical, polka, rock, marching band, new age, film scores, television theme music and advertising jingles.

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and SESAC's bilateral agreements with foreign PRO's, also recognize and indeed require that SESAC use its best efforts to license at arm's length domestic users of music of all sizes in all business sectors. In many other countries of the world "general" music users at the retail and consumer level — including taverns, restaurants, night clubs and other like establishments — in fact often pay a far higher level of fees than similar small businesses in the United States. The Copyright Office has advised Congress, in connection with H.R. 789, of the serious danger that overly broad exemption of such for-profit music users could cause the United States to fall out of compliance with its legal obligations under international copyright treaties.

This Committee has heard from some witnesses about allegedly abusive practices in music performing rights in the United States. SESAC does not engage in abusive practices. Because of its small size, SESAC does not normally make on-site visits to small businesses of the kind that have drawn complaint and it most frequently communicates with potential licensees by telephone or mail. Indeed, SESAC has generally maintained excellent relations with its licensees and has not had any need for extensive litigation to enforce the rights of its affiliates. Nonetheless SESAC, along with the other PRO's, is very concerned that some of the most extreme talk about abusive practices that the Committee and Congress have heard, from certain organized groups, is being used as a rather transparent excuse to avoid the legitimate obligation to pay for the use of copyrighted musical works. For Congress to respond to such emotional, self-serving and, SESAC submits, unwarranted appeals would be a serious disservice to the principles of law that have been recognized in this field and that have traditionally been well preserved by this body.

SESAC considers obtaining a license to be an entirely appropriate cost of doing business for establishments which use copyrighted music to enhance the environment for their customers. Nonetheless, over many months SESAC has worked closely with licensees and the other PRO's in an effort to reach agreement on a fair and workable compromise that will accommodate the stated concerns of small licensees while at the same time preserving the copyright and business interests of songwriters and music publishers. The Committee has already been apprised of the fair compromise that has previously been reached with the National Licensed Beverage Association which, the NLBA has estimated, would already exempt more than 75% of eating and drinking establishments from music licensing requirements.

Similar efforts in which SESAC participated over an extended period were undertaken with the National Restaurant Association, unfortunately to no avail. There is no need to rehash the checkered history of those good-faith efforts by our industry. SESAC would simply suggest that when an industry seeks to totally exempt 90% or more of its members from paying for a license to use a product in connection with their for-profit businesses, as has the NRA, and when it claims that to do less represents an "abuse" of copyright licensing, then SESAC respectfully submits that this Committee should greet such claims with all due and appropriate skepticism. At the point where a 75%-plus exemption accepted by another major group in the industry is

rejected out of hand by the NRA, is it not perhaps fair to ask whether what is really being sought is simply a political pelt to be tacked on the wall by a powerful lobbying organization — on the theory that if you can get more you'll ask for it — rather than genuine fairness in music licensing?

SESAC hopes to be of help to the members of the Committee and other members of Congress as we continue our joint efforts to resolve the important issues presented in the music licensing bills that have been introduced, and SESAC commends you for the interest you have shown. As this letter is written, SESAC and the other PRO's are continuing their efforts to move these matters toward resolution. It is to be hoped that a spirit not only of compromise but also of reason will find its way into that process and will culminate in a bill that is indeed fair to small business while preserving the overriding principles of the copyright law and America's competitiveness in the world economy.

Madame Chair, SESAC thanks you again for your attention to SESAC's views on these matters. We respectfully request that these comments be included in the record of the Committee's hearings on "Music Licensing and Small Business." If you or other members of the Committee have any questions concerning these comments, please feel free to direct them to the undersigned.

Very truly yours,

Henry R. Kaufman

Henry R. Kaufman
Senior Vice President, General Counsel
SESAC, Inc.
421 West 54th Street
New York, NY 10019-4405
(212) 586-3450

Of counsel:

Kenneth M. Kaufman
Roberts & Eckard, P.C.
1150 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
(202) 296-0533

cc: The Honorable John J. LaFalce

CHURCH MUSIC PUBLISHERS ASSOCIATION
P.O. BOX 158992
NASHVILLE, TN 37215
(615) 791-0273
FAX (615) 790-8847
DIANE S. COBB, EXECUTIVE SECRETARY
DAVID L. MADDOX, LEGAL COUNSEL
J. RUSH HICKS, JR., LEGAL COUNSEL

May 3, 1996

The Honorable Jan Meyers
Chair
House Small Business Committee
Room 2361 Rayburn HOB
Washington, D.C. 20515

Dear Madam Chair:

As President of the Church Music Publishers Association (CMPA), I am pleased to enclose herewith a copy of our statement for the record of the hearings on Small Business Copyright Protection scheduled for May 8, 1996.

While we would have preferred to have had the opportunity to testify in person, we do appreciate your making our statement a part of the permanent record of the hearing.

As many Members of the Committee may realize, the creative music property promoted and protected by our members is usually a fundamental component of religious-formatted radio broadcasts.

Should you have any questions or need additional information, please feel free to contact me.

Sincerely,

Geoffrey R. Lorenz
President - Church Music Publishers Association

GRL:ddv

Enclosures

ABINGDON PRESS • ALFRED PUBLISHING COMPANY, INC. • AMG/ANTARA MUSIC GROUP • AUGSBURG FORTRESS • BECKENHORST PRESS, INC.
BENSON MUSIC GROUP • BMG MUSIC • FRED BOCK MUSIC COMPANY • BRENTWOOD MUSIC, INC. • BRIER PATCH MUSIC • CHORISTERS GUILD
CONCORDIA PUBLISHING HOUSE • RANDY COX MUSIC • DIADEM RECORDS • EMI CHRISTIAN MUSIC PUBLISHING • GAITHER MUSIC COMPANY
GENEVOX MUSIC GROUP • G.I.A. PUBLICATIONS, INC. • GOSPEL PUBLISHING HOUSE • HOPE PUBLISHING COMPANY • INTEGRITY MUSIC, INC.
KURT KAISER MUSIC • NEIL A. KJOS MUSIC COMPANY • LILLENAS PUBLISHING COMPANY • LORENZ CORPORATION • MANNA MUSIC, INC.
MARANTHA! MUSIC • OCP PUBLICATIONS • THEODORE PRESSER COMPANY • PRISM MUSIC • REVIEW & HERALD PUBLISHING ASSOCIATION
SHAWNEE PRESS, INC • SILVERSPRING MUSIC • SPIRITSOUND/PATHWAY MUSIC • STAR SONG • GORDON V. THOMPSON MUSIC • WORD, INC.

STATEMENT OF DON CASON IN BEHALF OF THE CHURCH MUSIC PUBLISHERS ASSOCIATION BEFORE THE HOUSE SMALL BUSINESS COMMITTEE -- HEARINGS ON MUSIC LICENSING LEGISLATION

May 8, 1996

Madam Chair:

Thank you for the opportunity to present the views of the Church Music Publishers Association on pending legislative proposals which we believe will seriously reduce the incomes of our publisher members and the thousands of religious songwriters who depend upon us. Together, we publishers and songwriters are partners in the creation of the vast majority of religious music of the Christian faith used in churches and on religious broadcasts.

As small business entrepreneurs, we are here today to ask the powerful corporate speculators who trade in communications properties one basic question: "Even when our levels of income are already so low, how can you justify changing the law so that those who seek to broadast our music can pay us nothing?"

The question echoes in the recent turn of events in the public debate over the rationale for destroying the efficacy of the blanket music licensing system as it applies to our

members. It has been particularly disturbing to hear specious facts used to justify cutting the income of religious music creators, and then to hear them repeated by decision-makers in this body. Those who seek major change in copyright law seem to us to have little background with the demands of dealing with intellectual property or the justice inherent in being paid by all property users in this information age.

In essence, while our music is being used to benefit other business enterprises, including radio stations that generate millions in profits, we are being told that the government should decree that our creative property must be given away for little or nothing.

BACKGROUND OF THE CHURCH MUSIC PUBLISHERS ASSOCIATION

Let me share with you what comprises the Church Music Publishers Association. The CMPA was founded in 1926. Among our current members are the music publishing departments of the United Methodist denomination, the Southern Baptist denomination, the Assembly of God, Church of the Nazarene, Seventh-Day Adventists, Church of Christ, Church of God, and the Lutheran Church Missouri Synod. Also among our members are small commercial businesses which create products for Episcopalians, Roman Catholics, Presbyterians, other Baptist denominations, and all other independent churches of the

Christian faith. We do have a few members who have most recently been acquired by larger music companies such as EMI and BMG; but even these have stayed focused on this targeted church market.

You may actually know us better by our songs. Of the over 150,000 songs owned by our membership, the more recognized titles are "How Great Thou Art," "Great is Thy Faithfulness" and "The Old Rugged Cross." You will hear our songs sung by church choirs and congregations. You will hear them performed by organists, pianists, handbell choirs, brass ensembles, and even marching bands. The musical styles of our songs vary from hymns, choral, liturgical, Southern gospel, country, Christian contemporary, Christian rock, praise and worship, and gospel, to classical.

Our songs are sung by artists such as Amy Grant, Michael W. Smith, George Beverly Shea, Wynonna, Johnny Cash, Dolly Parton and Ray Charles, yet are also sung as passionately by pre-schoolers at churches in cities and towns across the United States.

Even though our music may find its way into commercial or non-commercial channels, be it educational or inspirational, it is still created by small business people ... individual songwriters who are driven as much, if not more, by their

message as by their earnings. It is music that is nurtured by small business people ... publishers who see very little profit from what they do; or, as in the case of denominational publishing departments, they pour their earnings back into the development of their churches.

THE POLITICAL INCONGRUITY OF MUSIC LICENSE LEGISLATION

Madam Chair, as small business people struggling to survive with a product that has a relatively small audience and even smaller commercial base, we are experiencing one of the most incongruous political episodes in our history. First, this 104th Congress, which was elected vowing to limit the intrusion of the Federal Government into our lives, is considering the most tyrannical price-fixing legislation in the history of American intellectual property. It is a savage threat to our religious music publishers and songwriters. Second, the House Small Business Committee is compounding that threat at the apparent behest of major bar and restaurant chains, as well as private religious broadcasters who generate incredibly quick and astounding profits.

We have had a long experience in dealing with those who use any pretext to devalue religious music. It is with deep concern that we note their groundless arguments have apparently succeeded with many members of the Congress.

Yes, as set forth in the U.S. Copyright Law, our music may be freely performed by all who worship in their Churches and other places of assembly, and we adamantly agree that it should be. However, many in this Congress would use that limited exemption as a pretext to try to give away religious music for free to those private corporate speculators who routinely trade in broadcasting properties, in particular religious broadcast properties. Those Members of the 104th Congress would legislatively eliminate our performing rights revenue from the use of our creative musical property used on radio programs no matter how much station owners may profit; no matter how much commercial advertising is carried by those broadcasters; no matter how much money the stations may charge for airing the religious programs that use our music; no matter that some of the stations using our music are totally commercial enterprises that don't even employ religious program formats. We believe that is a fair reading of the House legislation that affects us.

I might point out that many of these religious format stations which use our music are <u>often</u> extremely profitable operations. For example, the head of the Religious Broadcasters Music License Committee owns 26 radio stations through his Salem Communications Corporation. He purchased KDBX-FM in Portland, Oregon, in May of 1995 for $1.3 million,

and, according to the April 15, 1996, edition of Broadcasting & Cable magazine, has now announced that he is selling the station for $14 million -- not a bad return on investment in less than a year! And, to make matters worse from our perspective, there is serious doubt that the new owners of KDBX-FM will continue to use religious music as their format.

Yet, Madam Chair, some Members of Congress propose to treat the small business people who produce and distribute most of the religious music used around the world as unpaid patrons of these wealthy radio station owners.

## THE PRACTICAL GENIUS OF THE BLANKET LICENSE

Madam Chair, the attack on the blanket license is the most threatening of the confusing tactics employed by music users who inspired the music licensing bills before the House. The blanket license is the most popular performing rights licensing mechanism employed around the world for several reasons. One of the most important is that it rewards intellectual property owners in direct proportion to the success of the venture in which the intellectual property is used. In essence, it is a minute fraction in the ebb and flow of the revenue stream which it helps to create.

Thus, it provides the most practical and modern financial

model available for use in all mediums of broadcasting, including those forms for the future on the Information Highway.

This fair system of compensation based on commercial success has several intellectual property business principles inherent in it. These include concurrent payment for concurrent use and sequential payment for sequential use.

Why should a restaurant owner pay for a musical performance over a loud speaker when a radio station has already paid something to transmit the music to the restaurant? "Concurrent payment for concurrent use" insures that the music property owners will share in a minuscule way in each revenue stream that is enhanced by the use of their property. Everyone who benefits from the use of creative property should be obliged to pay something to its owner and creator.

Why must a religious-format station pay for music that was originally used cost-free at a religious service? "Sequential payment for sequential use" means that the radio broadcast of a church service creates a new benefit which should be recognized in a modest payment to the music owners for contributing their property to that benefit. This is especially fair if everyone else is being paid for their

"value-added" contribution to the broadcast.

Why should the law decree that a per-program license be directly proportional to the cost of a blanket license without the imposition of administrative and other transactional fees? The per-program and blanket licenses are two very different legal and business systems which should not be arbitrarily defined in terms of each other. At the very least, a per-program license at a fee that is directly related to the music actually used in a particular program must entail higher administrative costs than a blanket license that requires no music use record-keeping. The law would never decree that a weekly property rental should only be one-fifty-second (1/52ND) of the cost of an annual rental; or that the owner could not increase the weekly rental for the added administrative, maintenance, and clean-up costs of the weekly renter. Clearly, that would involve impermissible legal rationing and the co-mingling of two very different commercial transactions in a way that arbitrarily deprives owners of the opportunity to obtain a reasonable return for differing uses of their properties.

## BLANKET LICENSES PROTECT MUSIC USERS

Probably the most important value of the blanket license is its benefit to music users. A leading text book on the

concepts and legal aspects of performing rights organizations[1] comments in very glowing terms on the value of the blanket license to property users:

> First, it minimizes the burden on a music user to clear the rights for each and every work by that user.
>
> Second, it provides instantaneous access to the millions of works in a repertory without prior notice or individual authorization -- even in the case of spontaneous live works that happen to be broadcast.
>
> Third, it allows the user the right to use music that wasn't even created when a license was granted without any new cost or delay in negotiating new licenses. What other property can be used with such ease and cost-free legal and commercial transactions?

Since it encourages the maximum use and exposure of creative music works, there is also obvious good reason why the blanket license is favored by music property owners.

---

[1] Collective Administration of Copyrights and Neighboring Rights by David Sinacore-Guinn (1993)

Finally, since it benefits both users and producers of intangible property so successfully, there is equally good reason why it was looked upon as the most promising model for many financial transactions over the Information Highway. Of course, Congressional threats to have the government arbitrarily destroy the legal foundations of the blanket license system can only diminish that promise.

## THE PER-PROGRAM LICENSE

The judicial consent decrees of the major performing rights societies which are enforced by the U.S. Department of Justice and administered by the New York Federal Courts require the performing rights societies to offer, in addition to the commonly used blanket license, a per program license which provides the broadcaster with a genuine economic choice. The licensing choices currently available to all radio station owners have for years been thoroughly analyzed by economic and legal experts and have been reviewed by the federal courts and held to be reasonable. In fact, the performing rights organizations maintain that the number of stations using the per-program license has increased ten-fold since 1978; also, we are told that 10% of all commercial radio stations have embraced this license because it saves them substantial amounts over the blanket license.

The lobbyists who are pushing for a legislative per-period program, price-fixing remedy conveniently ignore the fact that a per-program license was never originally conceived of as being proportional to a blanket license. They also perpetuate misinformation about the nature of the blanket license, which has traditionally produced license fees that reflect average music use of the entire industry. Thus, a station's blanket license fee was never conceived of as a ceiling price for other purposes. By using analogies which were never appropriate for pricing intangible property rights, the proponents of music licensing legislation have deceived decision-makers about the nature of the issues involved.

In looking at pricing alternatives for creative property, we should be asking: How do we preserve the financial incentives that reward music creativity? What is the most expeditious way to provide music users with access to larger and ever-changing repertoires of music? How can we insure a modicum of fair payment to music property owners yet reflect sensitivity to the music users whose programming needs are quite diverse?

Unfortunately, the proponents of this legislation are supported by special interest lobbyists who are trying to further develop their own businesses by legislatively

undermining the intellectual and property rights granted to publishers and songwriters. It is sad to see that the method of their attack is to sow confusion throughout this Congress about the commercial aspects inherent to intellectual property. Please do not be deceived ... this legislation is a serious threat to the copyright laws that have been tested for many years.

## CONCLUSION

Madam Chair, as a group of businesses which are wedded to the success of smaller businesses -- the writers of religious music -- we urge you to recognize the extraordinary genius of the music copyright system, and act to protect it from those groups who are attacking it for the prospect of their own financial gain. If the critics of the current licensing system succeed, the result will surely create instability within the music industry, particularly for religious publishers such as ourselves, but it also may make our society spiritually poorer in the end.

## PETITION FOR THE ABOLISHMENT OF ASCAP/ BMI

We, the undersigned, request that American Society of Composers and Publishers (ASCAP) and Broadcast Music Inc. (BMI) be abolished from operating and collecting money in the state of Minnesota. We feel that these organizations are not fair or ethical in their methods and that the moneys collected are not reasonable or just. We object to the representatives' of ASCAP and BMI for these reasons:

1. Harassment.
2. Unreasonably high fees causing business shutdown.
3. Failure to properly identify themselves upon request.
4. Late night phone calls.
5. Stopping of community events where music is involved.
6. Intimidating behavior.
7. Frightening appearance.
8. "Tough" attitude.

Because we feel that the musicians, the business owners and the general body of entertainers are not served by these organization we ask that they be voted out of Minnesota and a full investigation be made by appropriate government departments. Thank you.

**Partial list of signers- business only:**

VETERANS OF FOREIGN WARS
GILMORE WEIK POST 5252
P.O. BOX Q
PELICAN RAPIDS, MN 56572

SILVER DOLLAR BAR & GRILL
ELIZABETH, MN. 56533

KRAEMER'S SUPPER CLUB
EVANSVILLE, MN. 56326

OLD BRICK INN
BATTLE LAKE, MN. 56515

MILLS LIQUORS
NEW YORK MILLS, MN. 56567

V.F.W. POST 3289
NEW YORK MILLS, MN. 56567

V.F.W. 4020
PERHAM, MN. 56573

FRAZEE MUNICIPAL
FRAZEE, MN. 56544

V.F.W. 3922
WADENA MN. 56482

ELKS
WADENA, MN. 56482

V.F.W. POST 5252
PELICAN RAPIDS, MN. 56572

V.F.W. POST 1676
BARNSVILLE, MN. 56514

VAGT'S BARN
RT. 1, BOX 158
BRECKENRIDGE, MN. 56520

CASEY'S BAR
202 MINN. AVE.
BRECKENRIDGE, MN.56521

SONJU & ASSOCIATES AUCTIONEERS
ALEXANDRIA, MN. 56308

INSULITE INSOLATION
FERGUS FALLS, MN. 56537

GRAYSTONE LODGE
BATTLE LAKE, MN. 56515

RIVER FRONT
UNDERWOOD, MN. 56586

We, the undersigned, request that American Society of Composers and Publishers (ASCAP) and Broadcast Music Inc. (BMI) be abolished from operating and collecting money in the state of Minnesota. We feel that these organizations are not fair or ethical in their methods and that the moneys collected are not reasonable or just. We object to the representatives' of ASCAP and BIM for these reasons:

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Ralph Harlow
Gary Wagenman
Donald L Benson
Larry Schmidt
Dorothy Miller
Ben Hansen
George Hamilton
Ed Fremuth
B Hamm
Ray Haley
A. Cook
Al Fremuth
Georgia Fremuth
Ted Sigsund
Dorothy Hansen
Hale Gardner
Robert P Williams
Eugene J Stahl
Gary E Hansen

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Viking Palace - Glenn Whitney
Dec 26 - 94

FW 5252 + Auxiliary
Pelican Rapids, Minn 56572
12-20-94

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Earl Mickelson Comdr V.F.W Post 5252 Pelican Rapids.
All Live Music has been Canceled due to this.
Letters & Telephone Calls demanding Paymt.
Have been in our Club checking to see if
we allow non Members (Name of their Business)

---

Richard Wuttke Manager VFW Post 1674
We have been Harassed by ASCAP
employees For years. We have Asked
them to stop to No Avial.

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| | | | |
|---|---|---|---|
| Beverly Coon | VFW 3922 | Hadena Minn | 12-19-94 |
| Wallace Coon | VFW 3922 | Wadena Minn | 12-19-94 |
| Joan Wille | ELKS | Wadena Minn | 12-19-94 |
| Vince Kennick | ELKS | Wadena Minn | 12-19-94 |

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Jill Wicka Eagles Manager 12/19/94

Donald Barthels, Bookkeeper, Hoyt Municipal 12/19/94

Jim Lee VFW Perham Manager 12/19/94

Mary Johnson Perham, Mn 12-19-94

Sara Vaughan, VFW Post 3289, Mgr

Sandy Barthel, Milt Ryman

Missy Herrian Perham, MN

Jim n Sue Ellen Old Brick Inn Battle Lake

Judi Kraemer - Kraemer's Supper Club Detroit Lakes, Mn -

Kelly Bargren - Silver Dollar Bar + Grill Elizabeth

Dec 28, 1994

Ruth,

In regards to our telephone conversation last nite

I have had the same experience you have had with ascap. They are terrible. Seems like they also wont tell you where the money goes & how much they keep.

The dues they charge are outragious. According to them we shouldnt be able to even play our radios.

If I can help you need any help call me.

Bob Vagle
Rte 1, Box 158
Breckenridge, Minn
56520

Ph:
218-643-3587
over

We, the undersigned, request that American Society of Composers and Publishers (ASCAP) and Broadcast Music Inc. (BMI) be abolished from operating and collecting money in the state of Minnesota. We feel that these organizations are not fair or ethical in their methods and that the moneys collected are not reasonable or just. We object to the representatives' of ASCAP and BMI for these reasons:

1. Harassment.
2. Unreasonably high fees causing business shutdown.
3. Failure to properly identify themselves upon request.
4. Late night phone calls.
5. Stopping of community events where music is involved.
6. Intimidating behavior.
7. Frightening appearance.
8. "Tough" attitude.

Because we feel that the musicians, the business owners and the general body of entertainers are not served by these organization we ask that they be voted out of Minnesota and a full investigation be made by appropriate government departments. Thank you.

EDWARD J CASEY
Edward J Casey
CASEY'S BAR
202 MINN. AVE
BRECKENRIDGE MN
56520

CARL CASEY
Carl Casey
Same add.

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Sid Goeden
Betty Shramstad
Rod M Shramstad
Darwin Dunbar
Larry Wachek
Hels Rostad
Benny Phaus
992 Vadnais Hts.
Jen Lund
Bob Lund
Dave Buyske
Hjalmer Pederson
Lorie Pederson
Judy Bauer
Jim Beam
Greg Barr

Donald A Robert
Karen R Zell
Graystone Lodge - Otter Tail Lake

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Name / Date / Company

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Ramona Hoyle Morris Howard

Duane Tallman
Rt 6 Box 158 mm
Virginia Minn 55792
218 749 4645

Roger Petron

Bruce Finkelson (218) 498-3205

Delores Brown

Daryl [illegible]

Richard Waterstad

Keith Kenyon

Larry Sherwood

Walter Eastman

Barbara Jackson

Paul Heinonen

Leroy Brown

Geo. Fredericksen Fergus Falls Minn.

Christine Sykia Ft. Ripley Minn

Carl Hendrickson

Blanche Aasted

Earl Armbrough

Cecil Johnson

Gegmaine Wieser Olsen

Simon C. Olson

Connie Sherwood

Seattle Wash. Iris Henderson

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Name. Date Company or Business

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